INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Reasons for granting the writ	7
Conclusion	17
Appendix A: Court of Appeals Opinion	1a
Appendix B: Court of Appeals Judgment	19a
Appendix C: District Court's Opinion	21a
Appendix D: Opinion of the Secretary of the Interior	47a

CITATIONS

Cases:	
Avco Corp. v. *Aero Lodge 735*, 390 U.S. 557	9
Best v. *Humboldt Mining Co.*, 371 U.S. 334	8, 10
Boesche v. *Udall*, 373 U.S. 472	10
Brennan v. *Udall*, 379 F. 2d 803, certiorari denied, 389 U.S. 975	14
Callanan Road Co. v. *United States*, 345 U.S. 507	7, 8
Cameron v. *United States*, 252 U.S. 450	7, 8
Foltz v. *St. Louis & S.F. Ry. Co.*, 60 Fed. 316	9
Gabbs Exploration Co. v. *Udall*, 315 F. 2d 37, certiorari denied, 375 U.S. 822	15
Hamilton v. *Ertl*, 146 Colo. 80, 360 P. 2d 660	13
Hodgson v. *Midwest Oil Co.*, 17 F. 2d 71	16
Ickes v. *Development Corp.* (*Virginia-Colorado*), 295 U.S. 639	2, 5, 6, 7, 8, 9, 10, 13, 15, 16
Swift & Co. v. *United States*, 276 U.S. 311	8
Tehan v. *Shott*, 382 U.S. 406	10
United States v. *Williams*, 341 U.S. 58	9
West v. *Standard Oil Co.*, 278 U.S. 200	15
Wetzel v. *Minnesota Railway Company*, 169 U.S. 237	14
Wilbur v. *Krushnic*, 280 U.S. 306	4

352-158—69 —1

Statutes and Executive Orders: Page

Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq*---- 3

Taylor Grazing Act, 43 U.S.C. 315---- 12

30 U.S.C. 28---- 2, 13

Executive Order No. 5327, April 15, 1930---- 11

Executive Order No. 6016, February 6, 1933---- 11

Interior Decisions:

Interstate Oil Corp. et al., 50 L.D. 262---- 16

Kinney, E. C., 44 L.D. 580---- 16

Shale Oil Co., 55 I.D. 287---- 5

Standard Shales Prod. Co., 52 I.D. 522---- 16

Union Oil Company of California, et al., 71 I.D. 169-- 6

Union Oil Company of California, 72 I.D. 313---- 7

Miscellaneous:

Davis, *Administrative Law Treatise* § 18.10---- 7

Lindley, *Mines* (3d ed.) vol. 1---- 16

Moore, *Federal Practice* ¶ 60.25[2] (2d ed. 1968)---- 9

In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on February 4, 1969.

OPINION BELOW

The opinion of the court of appeals (App. A) is reported at 406 F. 2d 759.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1969 (App. B). On April 26, 1969, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including June 4, 1969, and on May 27 he granted a further extension to June 19, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a 1935 holding of this Court that the Secretary of the Interior had exceeded his authority in cancelling certain mining claims must be given retrospective effect as to other mining claims previously cancelled on the same ground and which were not reasserted until the 1950's.

STATEMENT

Respondents are the present owners of claims to oil shale mining locations in Colorado. These claims were cancelled by the Secretary of Interior in 1928-1931 when he determined that the then owners of the claims had failed to meet a statutory obligation to do assessment work—$100 annual labor or improvements on each claim—as required by 30 U.S.C. 28 (R. 412-415).[1] In 1935, this Court held that the requirement of assessment work could not be used as a ground for cancellation by the government, but was significant only for the purpose of determining rights to the claim as between competing prospectors. *Ickes* v. *Development Corp.* (*Virginia-Colorado*), 295 U.S. 639. The present claims were not involved in that case, and no attempt was made then, or until the late 1950's, to revive them (App. 68a, R. 3, 122). They remained cancelled on the Department's records. The issue posed in the present action, and resolved adversely to the Secretary in the courts below, was whether *Virginia-Colorado* had ren-

[1] References to the printed record in the court of appeals are designated "R."

dered the prior cancellations void, so that the Secretary was required to recognize the claims however tardily presented.

The claims were all located before 1920—necessarily so, since the Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*, provided that rights to the development of oil shale could thereafter be obtained only by leases under that Act. At the time, there was a great deal of public excitement about oil shale; the nation's known crude oil resources were severely limited, and it therefore seemed that oil shale would soon be required to satisfy the demand for petroleum products. Interest in oil shale flagged, however, when substantial deposits of crude oil were found; thousands of oil shale claims were abandoned and forgotten by the original locators. Before passage of the Mineral Leasing Act of 1920, failure to do assessment work meant that another prospector could locate the claim himself. When that Act withdrew the land from further location, however, the threat of "top-filing," tending to enforce the assessment work requirement, was no longer present. Given this fact, the sudden disappearance of interest in oil shale claims, and the congressional mandate to reserve oil shale land for leasing, the Secretary determined to treat the failure to do assessment work as forfeiting the claim, so that the land could be put to other uses in the public interest (R. 23–70).

Proceedings against such claims began in the late 1920's, and took on substantial proportions. Investigation showed more than 30,000 oil shale claims, em-

bracing more than 4,000,000 acres of public domain in Colorado, Utah and Wyoming, which were not being maintained by the performance of annual assessment work (R. 1526). In the fiscal year ending June 30, 1932, the Secretary declared 10,918 locations, embracing 1,294,500 acres, null and void; and in fiscal 1933, 11,146 locations embracing 1,448,980 acres were cancelled (R. 1592). It is apparent from the volume of claims disposed of that the great majority of the mining claimants must have defaulted, taking no action to protect their interest in what then appeared to be worthless property. Indeed, of the claims involved in this case, only the then holders of the claims now made by respondent Brown appealed the cancellation within the administrative process; when that administrative appeal was lost, no effort was made to seek judicial review.

The infrequency with which judicial review was sought is striking when it is considered that, when sought, it succeeded. In January, 1930, this Court held in *Wilbur* v. *Krushnic,* 280 U.S. 306, that the Secretary could not cancel a claim where assessment work had lapsed for a year, but had been resumed before any administrative action had been undertaken against the claim. That decision left open the question whether cancellation would be proper where the Secretary took affirmative action against a claim after a lapse in assessment work and before resumption. The Secretary promptly began to take such action, posting property with challenges to the claims when it was determined that assessment work had not been done during an immediately preceding year. The massive

and basically unopposed clearance of claims described above then took place.

Among the few who contested these proceedings were the claimants in *Virginia-Colorado, supra,* who appear to have omitted their assessment work for only fifteen months preceeding the Secretary's action, and who alleged in their papers that they stood ready to resume it but for the Secretary's cancellation of their claim. In 1935, as already indicated, they brought their challenge to this Court, which ruled that even in a contest brought prior to resumption of assessment work, failure to do that work for a year was not a valid reason to cancel the claim and that, in doing so, the Secretary "went beyond the authority conferred by law." 295 U.S. at 647. The Secretary promptly "overruled" the contrary administrative decisions, *The Shale Oil Company,* 55 I.D. 287, vacated pending cancellation proceedings, and for a time stood ready to reopen cancellations which had already been made final. It appears that only about 74,000 acres of the several million involved were reclaimed in this fashion (App. 24a).

With the recent revival of interest in oil shale, speculators and others have been buying up the old, cancelled claims, arguing as respondents did here that they could not effectively have been cancelled by action that "went beyond the authority conferred by law."[2] Three of the respondents applied to the Secre-

[2] Most of the claims involved in this case changed hands at low, speculative prices in the mid-50's; a few, in 1948; and another small portion appears to have remained in the hands of the original claimants or their descendants. (See, *e.g.*, App. 27a–80a.)

tary for patents on such claims. The Secretary rejected the applications (App. D., *infra*) on the ground that, while his predecessor may have erred in cancelling the claims in the late 1920's and early 1930's for failure to do assessment work, he did have jurisdiction over the subject matter and his acts therefore were not void. The Secretary recognized that he could revive the cancelled claims in the exercise of his supervisory authority, but, after the many years of asquiescence, declined to do so. He stated (*Union Oil Company of California, et al.*, 71 I.D. 169, 177; App. D, *infra*, pp. 59a–60a): "the decision nullifying the claim will be treated as conclusive and will not be reopened in the absence of a legal or equitable basis warranting reconsideration."

The fourth respondent, the Oil Shale Corporation, did not apply to the Secretary but sought a declaratory judgment in the United States District Court for the District of Colorado that the Secretary was required to issue patents on proper application for the ostensibly cancelled claims. The case was consolidated with the three challenges to the administrative action, and the district court found, contrary to the Secretary, that the patents should issue (App. C, *infra*).

The court of appeals affirmed (App. A, *infra*) on the ground that this Court's decision in *Virginia-Colorado, supra,* "must be taken by us to hold that the Secretary was without power or authority under the laws to bring the adverse proceedings on the ground it did, and to so cancel the claims. This in the administrative area must be taken to mean his actions were void and of no legal effect" (*infra,* p. 12a).

REASONS FOR GRANTING THE WRIT

1. The court of appeals' principal ground of decision was that the cancellations involved in this case were void, and hence subject to collateral attack, under this Court's holding in *Virginia-Colorado* that such cancellations "went beyond the authority conferred by law." 295 U.S. at 647. This reading is in conflict with the decisions of this Court on the scope of the Secretary's jurisdiction to decide questions involving the public lands, and if permitted to stand would seriously encumber his administration of those lands.

In general, administrative decisional action is a legal nullity, and thus subject to being ignored or to collateral attack, only in circumstances in which judicial action would similarly be void—a defect of process, fraud in the proceedings, or the absence of power in the agency to consider the question put. *Cameron* v. *United States,* 252 U.S. 450, 459–460; *Callanan Road Co.* v. *United States,* 345 U.S. 507, 512; Davis, *Administrative Law Treatise* § 18.10. In the present case, the asserted defect is in regard to the last of these, subject matter jurisdiction.[3] In asserting that the Secretary had no power to decide the cancellation issue in the early 30's, however, the Tenth Circuit confused the issue of power with the question whether the proper legal standards were applied in the exercise of that power.

[3] Regarding the question of notice, the Secretary has held that the old default proceedings are subject to reopening as to any locator for whom receipt of service is not adequately shown. *Union Oil Co. of California,* 72 I.D. 313.

It is clear that the Secretary possessed ample power of decision with respect to mining claims, including the power of cancellation.

> * * * [S]o long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. * * *

Cameron v. *United States, supra,* 252 U.S. 450, 460; see also, *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336. Indeed, the opinion in *Virginia-Colorado* itself recognizes that power in referring to the several grounds on which invalidation or cancellation *is* authorized by law: lack of discovery, fraud, abandonment, etc. 295 U.S. at 645. *Virginia-Colorado* decided only that the Secretary was not authorized to cancel for failure to perform assessment work; it had no occasion to decide whether his reliance on this erroneous ground rendered his action—and his similar actions in the thousands of defaulted cases—void. That reliance would have had such an effect only if the Secretary's power to decide the issue was thereby "destroyed." *Callanan Road Co., supra,* 345 U.S. 507, 512. Plainly, it was not. As this Court has said in similar circumstances involving the jurisdiction of federal courts,

> * * * [T]he error, if any, does not go to the jurisdiction of the court. The power to enjoin includes the power to enjoin too much. * * * [*Swift & Co.* v. *United States,* 276 U.S. 311, 331.]
>
> "Jurisdiction is the power to decide a justiciable controversy, and includes *questions of*

> *law as well as of fact." Binderup* v. *Pathe Exchange,* 263 U.S. 291, 305. Even the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction. *Chicot County District* v. *Baxter State Bank,* 308 U.S. 371, 376. See also *Stoll* v. *Gottlieb,* 305 U.S. 165; *M'Cormick* v. *Sullivant,* 10 Wheat 192. [*United States* v. *Williams,* 341 U.S. 58, 66; emphasis supplied.]

The Secretary's error subjected the cancellation proceedings, when brought, to dismissal for failure to state a cause of action. But such a failure in any lawsuit, judicial or administrative, is no ground to set the decision aside as void after it has become final. Cf. *Avco Corp.* v. *Aero Lodge 735,* 390 U.S. 557, 561; *Foltz* v. *St. Louis & S.F. Ry. Co.,* 60 Fed. 316, 318 (C.A. 8); Moore, *Federal Practice* ¶ 60.25[2] (2d ed. 1968).[4]

The same practical considerations of need for final-

[4] The courts below also relied to some extent on an alleged administrative interpretation of this Court's decision in *Virginia-Colorado* as rendering all prior cancellations void. As the Secretary pointed out in his decision, *infra* pp. 68a–72a, the evidence of this interpretation is fragmentary and inconclusive; the interpretation itself was erroneous; and, most important, "there is no clear showing that any of the appellants knew of or relied upon any of [the documents tending to show the practice, reproduced as appendices to the Secretary's opinion,] at the time they acquired an interest in their claims" (at 72a). Such evidence of the interpretation as there is is largely confined to the period immediately following this Court's decision in *Virginia-Colorado*, and is thus consistent with what would have been a quite appropriate undertaking to reopen any improperly cancelled claims as to which that was desired *at that time.* It hardly need bind the Secretary or this Court *now*, decades after the decision, when it has become amply clear that the original locators had no continuing interest in their claims.

ity in the administration of justice which limit the circumstances in which judicial actions will be found to have been void also apply in the administrative setting. If it is decided that courts have been applying an erroneous principle of law in a class of cases, it would nonetheless be chaotic to declare that all prior decisions based on that principle, however final, are thereby deprived of effect. Indeed, even in criminal cases involving ongoing deprivations of personal liberty and matters of constitutional principle, the need for finality often prevails in determining whether judgments based on erroneous principles shall be subject to collateral attack. *E.g., Tehan* v. *Shott,* 382 U.S. 406. When administrative agencies err in applying the governing law, their action is frequently characterized in such terms as "beyond the authority conferred by law," 295 U.S. at 647; if on each such occasion all prior, final decisions resting on the same error were thereby nullified, agencies would be subjected to a far heavier burden of litigation, and the certainty of their adjudications would be substantially compromised.

In the particular case of the Secretary of the Interior, that burden would be insupportable. He is entrusted with management of the entire public domain. This Court noted the magnitude of that operation in *Best* v. *Humboldt Mining Co., supra,* 371 U.S. 339 n. 8 and *Boesche* v. *Udall,* 373 U.S. 472, 484 n. 13: during fiscal 1961, 27,228 mining claim adjudications were closed, and at the outset of that year, 159,000 mineral leases covering 125,000,000 acres of public domain were outstanding, requiring his supervision under the Mineral Leasing Act. In view of these responsibilities, and

others like them, it is manifest that the Secretary must be able to rely on his records of action taken affecting the land under his control, where those actions are not directly challenged by the individuals concerned. If legal error in a determination serves to render all prior, similar determinations void, this certainty—always thought particularly essential in the context of transactions affecting land—will be unattainable.

It is clear, moreover, that the cancellations of the 1920's and 1930's—albeit erroneously based—served the basic public policy of clearing public lands of abandoned claims to facilitate their use in the public interest. In reliance on the cancellations, the Secretary moved to promote those uses. Under the Mineral Leasing Act, all the lands were reserved for disposition under a leasing system providing for rentals, royalties, and continuing supervision for the benefit of the public as a whole.[5] Indeed, oil and gas leases have been issued on 8,860 acres of the lands involved in this case, and applications for leases are pending on an additional 5,280 acres (R. 7945–7948). Other of these lands have been withdrawn by Presidential order and placed in national reserves under the administration of the Department of the Navy (R. 7683–7693). Patents have been issued on 1400 acres of these lands under nonmineral land laws since the alleged location of these claims (R. 7794–7839). Bureau of Mines facil-

[5] Under Executive Order No. 5327, all oil shale deposits were withdrawn from leasing April 15, 1930 and reserved for investigation, examination and classification. Oil and gas leases on these lands were authorized February 6, 1933 by Executive Order No. 6016, and all the leases described in the following text have been issued since that day.

ities have been constructed on part of the land here involved, in connection with the experimental oil shale operation at Rifle, Colorado (R. 8550). Almost all of the land is in use as grazing land under the Taylor Grazing Act, 43 U.S.C. 315, and fences, reservoirs, and other range improvements have been constructed to support these operations (R. 7948–8463). If the old cancelled claims must be recognized, as the courts below held, their present holders may be able to quality for patents. In that event, they would receive title to the land and be able completely to disrupt this program of use, which was undertaken in reliance on the virtual absence of challenge to the massive cancellations of the 1920's and 1930's.

It does not follow from the decisions below that respondents are entitled to patents, since the claims remain subject to challenge, *inter alia,* for lack of discovery and abandonment. If these issues must be resolved on a case-by-case basis, however, as they presumably would have to be if the prior cancellations cannot be relied upon, the Secretary will be faced with an intolerable burden. There are at least 30,000 claims, most of them involving eight locators when made fifty or more years ago. To clear the title to the oil shale lands would require at least a diligent search for all their successors-in-interest, a number that by now could reach into the millions. To the cost of this search must be added that of litigation. One recent test case on the issue of discovery involved 39 hearing days, a 5,248 page transcript and approximately 2,000 exhibits. Plainly the monetary and administrative costs of contesting the cancelled claims today would be staggering.

2. The Secretary's invocation of laches to bar the present claims, permissible only if the cancellations may be given continuing effect, adequately distinguishes the holding in *Virginia-Colorado*. As already noted, the facts in *Virginia-Colorado* showed only a fifteen month interruption in assessment work, and the very fact that the cancellation proceedings there were vigorously contested tended to show that those claimants, unlike most, desired to maintain their claims. Thus, the Court stressed, "There is no ground for a charge of abandonment. The allegations of the bill [that there had been only a fifteen-month interruption and that the claimants stood ready to resume work], admitted by the motion to dismiss, dispose of any such contention." 295 U.S. at 646. Only one of the claims involved in this case, on the other hand, was appealed even administratively; in none did claimants seek either judicial review or post-*Virginia-Colorado* vacation of the cancellation. The claims lay dormant for twenty years, when (with limited exceptions) they were purchased at low prices, other locators on them were eliminated by forfeiture, and the present proceedings were begun.[6] Unlike *Virginia-Colorado,* this

[6] For example, the claims involved in respondent Oil Shale Corporation's petition were obtained through one Tell Ertl. Ertl approached various of the original locators in the mid-1950's and paid them a few hundred dollars for their rights. He then allegedly performed assessment work on the claims and filed forfeiture proceedings against the remaining locators, who apparently had not known of or participated in this work, under 30 U.S.C. 28. For 16 of the 77 claims involved, Ertl received $1,536,000 from the Corporation; the remainder are leased to it with an option to purchase (App. 23a; *Hamilton* v. *Ertl*, 146 Colo. 80, 360 P. 2d 660).

history shows that here the Secretary's hypothesis, that the oil shale claims on which assessment work had lapsed had been abandoned, was in fact correct.

In similar circumstances, this Court long ago held that the doctrine of laches could be invoked to bar the claim. The case involved the sale by a war widow and her children of the warrant for a quarter-section of government land her husband had received for enlisting in the armed services. The sale was made without first obtaining a necessary order from the orphans' court, but at a fair price; subsequently, the land obtained with the warrant was swallowed up by the growth of a major city and its value multiplied several thousand times. The widow's heirs sought to assert the defect in title caused by the failure to obtain an order from the orphans' court. This Court held against them, stating:

> If the complainant may put forward these excuses for delay [ignorance of the defect and want of means to investigate it] after thirty years, there is no reason why they may not allege the same as an excuse after a lapse of sixty. The truth is, there must be some limit of time within which these excuses shall be available, or titles might forever be insecure. The interests of public order and tranquillity demand that parties shall acquaint themselves of their rights within a reasonable time, and although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable.

Wetzel v. *Minnesota Railway Company*, 169 U.S. 237, 241. See also *Brennan* v. *Udall*, 379 F. 2d 803 (C.A. 10),

certiorari denied, 389 U.S. 975. Because the Secretary's supervisory authority over the public domain continues until a patent is issued, he is not bound by *res judicata,* and could have set the early decisions aside and granted the patents, *West* v. *Standard Oil Co.,* 278 U.S. 200, as at first he did for the few who requested that action in the immediate wake of *Virginia-Colorado.* In this case he elected not to do so, on the grounds that these claimants had waited too long and showed no equitable or legal reason to excuse that delay (*infra,* pp. 59a–60a). This was neither arbitrary nor capricious. See *Gabbs Exploration Co.* v. *Udall,* 315 F. 2d 37, 40–41 (C.A. D.C.), certiorari denied, 375 U.S. 822. As we have noted above, it is essential that there be some stability to the status of the public domain and that such status be apparent to the Secretary from his records, so that he may classify and administer the lands entrusted to his care by Congress. The alternative, we submit, is to create an uncertainty which would defy the best-intentioned administrator of this vast national resource.

3. For the reasons stated above, we do not believe *Virginia-Colorado* must be given retrospective effect to nullify the thousands of unchallenged cancellations of claim appearing in the Secretary's records, and which had become final by the time of that decision. If that is the necessary import of the decision, however, we are prepared to argue that, at least to that extent, the case was wrongly decided. It rested on the premise that the United States was utterly without interest whether annual assessment work was performed on a claim or not—that is, that once a pros-

pector had staked out a claim, he had a possessory right good against the United States in perpetuity, unless the government was able to prove his intent to abandon it; he had no obligation to work the claim. It is difficult to believe that the Congress which passed the Mineral Leasing Act of 1920 to promote the more efficient use of national resources could have been so careless with resources against which there was already a claim.

Indeed, the cases relied upon by this Court in *Virginia-Colorado* for the proposition that the government lacked interest in the performance of assessment work were cases where the government lacked any interest *in fact, i.e.*, they were cases in which there was no competing government use proposed at the time of the controversy. There was a well-established and distinct line of cases, not brought to this Court's attention at the time, which held that where there *was* such a competing use for which the government wished to reserve the land, for example, a national park, the government like any private prospector could divest a claimant who had not performed the necessary assessment work. See, *e.g.*, *E. C. Kinney*, 44 L.D. 580, 582; *Interstate Oil Corp. et al.*, 50 L.D. 262; *Standard Shales Prod. Co.*, 52 I.D. 522; *Hodgson* v. *Midwest Oil Co.*, 17 F. 2d 71 (C.A. 8); Lindley, *Mines* (3d ed.) vol. 1, pp. 398–399. The Mineral Leasing Act itself created such a competing use in this case.

We recognize that the decision in *Viriginia-Colorado* was unanimous, and that the issue is a statutory one as to which reexamination would not often be under-

taken. Should the Court inescapably conclude, however, that the decision, if left standing, must be given retrospective effect, we believe the implications for the public domain would warrant its reconsideration.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
PETER L. STRAUSS,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
EDMUND B. CLARK,
Attorneys.

JUNE 1969.

Appendix A

United States Court of Appeals, Tenth Circuit

[Filed United States Court of Appeals, Tenth Circuit, Feb. 4, 1969, William L. Whittaker, Clerk]

No. 9581

Stewart L. Udall, Secretary of the Interior, appellant

v.

The Oil Shale Corporation, et al, appellees

No. 9582

Stewart L. Udall, Secretary of the Interior, appellant

v.

Joseph B. Umpleby, et al, appellees

No. 9583

Stewart L. Udall, Secretary of the Interior, appellant

v.

Barnette T. Napier, et al, appellees

No. 9584

Stewart L. Udall, Secretary of the Interior, appellant

v.

Penelope Chase Brown, et al, appellees

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January 1969 Term

No. 9581

DISTRICT COURT No. 8680 CIVIL

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

THE OIL SHALE CORPORATION, ET AL, APPELLEES

No. 9582

DISTRICT COURT No. 8685 CIVIL

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

JOSEPH B. UMPLEBY, ET AL, APPELLEES

No. 9583

DISTRICT COURT No. 8691 CIVIL

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

BARNETTE T. NAPIER, ET AL, APPELLEES

No. 9584

DISTRICT COURT NO. 9202 CIVIL

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

PENELOPE CHASE BROWN, ET AL, APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Edmund B. Clark, Attorney, Department of Justice, Washington, D.C. (*Harold S. Harrison,* Acting Assistant Attorney General, *Lawrence M. Henry,* United States Attorney, *Roger P. Marquis* and *Thos. L. McKevitt,* Attorneys, Department of Justice, with him on the Brief), for Appellant.

Fowler Hamilton, New York City, N.Y., for Appellees, The Oil Shale Corporation, et al, and *Penelope Chase Brown,* et al; *Fred M. Winner,* Denver, Colorado, for Appellees, *Joseph B. Umpleby,* et al; *Karl Ranous,* Denver, Colorado, for Appellees, *Barnette T. Napier,* et al (*Tweedy, Mosley & Young,* Denver, Colorado, and *Cleary, Gottlieb, Steen & Hamilton,* New York City, N.Y., with them on the Brief).

Before PHILLIPS, HILL and SETH, *Circuit Judges.*

SETH, *Circuit Judge.*

These are appeals in four consolidated cases wherein the United States District Court for the District of Colorado entered judgments for the plaintiffs.

These plaintiffs were asserting that the Secretary of the Interior had no authority to deny applications for patents for oil shale mining claims on the ground that assessment work had not been done, or on the ground that the claims had previously been cancelled by the Department for the same reason. The Secretary in Union Oil Company of California, 71 I.D. 169, and 72 I.D. 313, had taken the position that he could deny such applications under his construction of the opinions of the Supreme Court in two cases involving departmental cancellation of claims for failure to do assessment work. The issue on this appeal is whether the trial court was correct in holding that these two previous decisions were binding in the present case, and that they had held that the departmental adverse proceedings and the cancellation orders there litigated were void as were all others entered on the same ground.

In three of the cases the plaintiffs sought relief by mandamus, and in the fourth case a declaratory judgment was sought.

There follows a brief summary of the history of the four groups of claims in the consolidated cases:

The Oil Shale Corporation Claims (*Case No. 9581*):

> These claims were located in December 1919 and January 1920. Contest proceedings were started against these claims by the Land Office in 1927 as Nos. 11,757, 11,759, and 11,761, for failure to do assessment work. In 1928 the Commissioner entered a decision that the claims were void. The decision was entered upon the failure of the contestees to appear and to answer the departmental assertion that assessment work was not done for the years 1921-1927. All the claimants of this group of claims have not made application for patents and were not parties in Union Oil Company of California, 71 I.D. 169.

Umpleby Claims (Case No. 9582):

These oil shale claims were located in 1918, were contested by the Land Office in No. 12,029 in 1929, and declared to be invalid and cancelled for failure to perform annual assessment work. Recently the claimants made application for patents which were rejected by the Secretary in Union Oil Company of California, supra.

Napier Claims (Case No. 9583):

These claims were located in 1918, were contested by the Land Office in No. 12,972 in 1931, and declared to be invalid and cancelled for failure to do assessment work. Patent applications for these claims were rejected by the Secretary in Union Oil Company of Cali[illegible] supra.

Brown Claims or Oyler Claims (Case No. 9584):

These claims were located in 1916, and in 1929 contested by the Land Office in No. 12,039, and declared invalid and cancelled for failure to do assessment work. Patent applications were rejected by the Secretary in Union Oil Company of California, supra.

When these placer claims were located the federal mining laws provided that upon a discovery of valuable mineral deposits upon the public domain, a mining claim could be established simply by marking the location so that its boundaries could be easily followed. The mining districts and the states added some additional requirements, but it was not necessary to secure the consent of any federal officials nor to even advise them of the location. Thus the discoverer could himself take steps immediately to protect his find. This was, of course, a practical and effective method for the prospector and miner, and it served to develop the mineral resources as was intended by Congress.

The markings at the location and state required notices served to advise other miners of the claim when they would go on the same ground. After the location was made it was required that the claimant perform a certain amount of work each year to demonstrate that he was holding it in good faith and to further advise others interested in the same ground that the claim was being asserted. Chambers v. Harrington, 111 U.S. 350. This assessment work was a requirement in virtually all of the mining districts by rule before the first federal statute on the subject was enacted. O'Reilly v. Campbell, 116 U.S. 418. Under the rules and the statute, if the work was not performed as and when required, the ground was then open to location by another person as if no prior claim had been staked. However, if no stranger so relocated the ground, the initial claimant could, after any failure to perform the work, resume assessment work and thereby the claim would not be subject to location by others. Belk v. Meagher, 104 U.S. 279. The assessment work year has been changed by Congress from time to time, and it has also provided moratoria for assessment work.

The basic federal requirements, the staking, and the assessment work were all acts relating to the ground itself and to create some condition which could be observed by persons seeking to locate claims in the same area. It was an inter-miner-prospector matter, and the federal government was not initially involved. The claims could, of course, be held indefinitely against others, and the Government, and be mined without doing more than making a valid location and performing the required assessment work. Upon the valid location, a possessory title passed from the United States to the locator which was a property right universally recognized. A patent could there-

after be sought by making application to the Land Office, but this was not a required step. The states in various ways supplemented the methods of marking and added a variety of notice, recording or filing requirements.

As to the assessment work aspect of claims made at the times these in question were made, it is apparent that the issue as to whether the work had been performed was a matter between rival claimants. It was precipitated by an overstaking and the resultant dispute as to whether the ground was then open for location. The issue was decided by the courts between the individuals concerned. 17 Stat. 93; see the older Departmental Regulations, 37 L.D. 757 (1909). Cameron v. United States, 252 U.S. 450. The current Regulations also expressly so provide. 43 C.F.R. § 3420.4.

It is important to consider the claims in question and the assessment work problems in this context of practice, district rules, and statutes alluded to above. The Federal Mining Leasing Act of 1920 (30 U.S.C. § 193, 41 Stat. 451) removed a few minerals including oil shale from the traditional method of location, and it must also be examined in this setting. As to those minerals not included in the Act, the traditional method generally prevails today. See Brennan v. Udall, 379 F. 2d 803 (10th Cir.).

When the Mineral Leasing Act became effective, no new mining locations could be made for oil shale as there was substituted a leasing method. Thus those locators who already had made valid locations before the Act were not thereafter faced with the possibility of other locators overstaking their claims for oil shale if assessment work was not performed. Thus, the assessment work requirement on pre-Mineral Leasing Act oil shale claims could not be "enforced" or tested by the acts of a second oil shale locator versus a prior

locator. The pre-Act claims were thus placed in a unique position.

The General Land Office soon after the passage of the Mineral Leasing Act undertook an ambitious program to eliminate the pre-Mineral Leasing Act oil shale claims upon which assessment work had not been done. This program included the claims here in issue, and they were all cancelled by departmental action following contest proceedings directed against them for a failure to do assessment work. The program led to litigation to test the authority of the Department to cancel claims for such a reason. This culminated in Wilbur v. Krushnic, 280 U.S. 306, decided by the Supreme Court in 1930, and in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639, in 1935. The claims in issue were cancelled before the decision in Virginia-Colorado.

It would not seem necessary to analyze at any length the two cases—Krushnic and Virginia-Colorado. They are treated by the trial court in its opinion at 261 F. Supp. 954, at 966, and in the literature on the subject of assessment work. 2 American Law of Mining, Title VII, § 7.1. It is sufficient to say that these cases held that the doctrine outlined above relative to assessment work and who could challenge locations for failure to do such work was not changed by the Mineral Leasing Act. The Court clearly held that the Department (Secretary) had no power or authority to cancel claims solely on the ground that the assessment work had not been done.

At the time of the Supreme Court decisions cited above, the administrative cancellation proceedings in the Land Office had, of course, progressed to various stages in different proceedings. Thus some proceedings had concluded and orders had been entered cancelling the claims, while in others the proceedings

were still in progress. But, as indicated above, cancellation orders had been entered in the contest proceedings directed against the claims here in issue. In 1935, following the Virginia-Colorado opinion, the Secretary in his decision, The Shale Oil Company, at 55 I.D. 287, stated that the adverse proceedings and the decision of the Commissioner cancelling certain oil shale claims in the case before him for failure to perform assessment work were void. The decision for the Secretary said of the Virginia-Colorado case:

> "In view of this opinion of the court, the adverse proceedings and decision of the Commissioner therein in the instant case must be held as without authority of law and void. The above-mentioned decision of the Department in the *Virginia-Colorado Development Corporation* case and the instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of *Francis D. Weaver* and *Federal Oil Shale Company* and other Departmental decisions in conflict with this decision are hereby overruled. The Commissioner's decision is reversed and the record in the case remanded with instructions to reinstate the application and entry *in toto* and dispose of the same unaffected by the default in the performance of assessment labor, and if all else is found regular, to clearlist the application for patent."

The Department for many years thereafter, as demonstrated by the record in these cases, adopted a policy that its prior cancellations and proceedings taken to cancel oil shale claims for failure to perform assessment work were invalid or were void. The expression of this policy continued until about the time of the decision in Union Oil of California, 71 I.D. 169, and 73 I.D. 313, which gave rise to this litigation.

It is well at this point to refer to the somewhat

older (1920) case of Cameron v. United States, 252 U.S. 450. There the Supreme Court upheld the right of the Land Office to challenge mining claims on the ground that a discovery had in fact not been made. The fact of discovery was and is the basic statutory fact required to support any mining claim. It has been referred to as the source of title and what segregates the claimed ground from the public domain. It must have taken place before any title passes from the Government to the claimant. The Court held in Cameron that the Land Office could challenge the mining claims there concerned as to this fact of discovery, but this was the extent of the decision. The claims there sought to be established were so located as to cover the Bright Angel Trail leading into the Grand Canyon. The issue was discovery and not assessment work. Also in Best v. Humboldt Mining Co., 371 U.S. 334, the Court had before it in general terms a case similar to Cameron, supra, and expressed no new concepts in the authority of the Secretary. See also United States v. Coleman, 390 U.S. 599.

The Government on this appeal would present the issue very broadly, as being the authority of the Secretary of the Interior as to entries and locations on the public land. If the question is so broadly stated there can be found any number of decisions where reference is made to the wide extent of his duties as to the public domain. See Boesche v. Udall, 373 U.S. 472. However the issue cannot here be put in such broad terms. Instead the issue must be limited to the effect of the Krushnic and Virginia-Colorado cases upon the prior departmental cancellations of claims for failure to do assessment work. There are some variations on this question and some related problems, but it is the basic issue.

It must be recognized that the departmental decision in Union Oil Company of California, supra, represents a reversal of the expressed policy of the Department which had prevailed since the Virginia-Colorado decision and The Shale Oil Company case, 55 I.D. 287, both in 1935. The record shows that this policy was expressed in correspondence, public statements, annual reports, and in official action. This official action includes the patenting of a substantial number of oil shale claims during this interval which had been previously cancelled by the Department for failure to do assessment work. This reversal of policy also represents a determination by the Secretary to have the Krushnic and Virginia-Colorado cases revisited. The Government in its brief states that the subject matter of this litigation is the same that was before the Secretary thirty-five years ago in proceedings leading to the Krushnic and Virginia-Colorado cases.

It is apparent that the private "enforcement" of the assessment work requirement through the overstaking by others of the ground covered by prior claims on which the work had not been done was completely thwarted by the intervention of the Mineral Leasing Act as to competing locations for oil shale. The old claims were thus sheltered by the Act. However the ground could have been relocated by others for non-Mineral Leasing Act minerals had they been discovered (ignoring withdrawal problems). With the removal of relocation as the method to make the nonworked locations available, the Department undertook its campaign to cancel which was halted by the Krushnic and Virginia-Colorado cases, and has here again resumed its efforts. The Secretary in the Virginia-Colorado case argued the effect of the Act described above. The Government in its

reply brief in the appeal before us states that the decision in Virginia-Colorado is "wrong" but suggests that since we are bound by it, "it should be confined to its exact facts. . . ."

We find no change in the authority of the Secretary since the Supreme Court decisions referred to above. There has been some relatively minor statutory change but it does not affect this issue. The Supreme Court held in Virginia-Colorado that the Secretary was acting outside his statutory authority when he cancelled the claims for the reason he did. The Court said: "We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law." It was a clear and direct holding, and it followed the Khrushnic decison and, of equal importance, it followed Cameron v. United States, 252 U.S. 450. The decision must be taken by us to hold that the Secretary was without power or authority under the laws to bring the adverse proceedings on the ground it did, and to so cancel the claims. This in the administrative area must be taken to mean his actions were void and of no legal effect. They were beyond his authority conferred by law, and this is the sole source of his power. Pan American Petroleum Corp. v. Pierson, 284 F. 2d 649 (10th Cir.). The Secretary so understood as indicated in the departmental decision in The Shale Oil Co., 55 I.D. 287, and by his later patenting of other cancelled claims. If his acts are so treated, the cancellations of the claims here concerned were of no effect and they stand as if no departmental action to cancel had been taken. Gabbs Exploration Co. v. Udall, 315 F. 2d 37 (D.C. Cir.), may have arrived at a somewhat different conclusion, but it relied upon an abandonment assertion. It does not make much difference how this absence of administra-

tive power is characterized, whether it is called lack of jurisdiction as the term is used with reference to the courts, or whether it is a lack of statutory power or authority, or lack of a duty covering the particular action attempted.

In West v. Standard Oil Co., 278 U.S. 200, the Court had before it an action against the Secretary of the Interior to enjoin proceedings in a local land office ordered by him to determine whether certain lands were known to be mineral at a certain time, and thus to attempt to determine whether title passed to the State under the Act of March 3, 1853. The Court found that the Secretary had no "affirmative duty" to the state or to a claimant. The Court said that Congress did give the Secretary the "power" to pass generally on the right of the state to the land. The Court said:

> "The broad power of control and supervision conferred upon the Secretary 'does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act.' Payne v. Central Pacific Railway Co., 255 U.S. 228, 236."

The Court concluded that the prior Secretary had acted without authority, and in substance that his order was of no effect. The Court placed the determination of power on the finding of a "duty." Under the circumstances before us the Court had also found no duty within the statutes. It is reasonable to conclude from the West opinion that the action of the Secretary there was void as it was here.

Thus we must hold, as did the trial court, that under the prevailing decisional and statutory law, the initial administrative proceedings as such and also the cancellation of the claims here in issue were of no effect. The Supreme Court decisions were

handed down some thirty years ago and Congress has not extended the power of the Secretary as to this particular matter as well it could because it has been seriously concerned with oil shale development. In any event, if it was then deficient the acts then taken were void. As to whether the Secretary can now refuse to patent by reason of gaps in annual assessment work we feel bound by the Supreme Court's decisions and by the absence of Congressional action. The Secretary must follow those decisions on this point.

The Government here argues in effect that the Secretary has all the powers mentioned in the Constitution relating to public lands, but this cannot be. These powers are not in the Secretary, but are vested in Congress and he has what the statutes provide that he have and no more.

It must be borne in mind that these proceedings, derived as they are in part from the Union Oil of California case, are concerned only with the annual assessment work problem, and not with the many other hurdles which must be crossed by a claimant on the way to patent.

The Supreme Court cases removed the issue with which we are here concerned from the administrative arena and decided, and said expressly, that the basic power and authority of the Secretary was lacking as to his cancellations; and equally important was lacking as to his challenge to the claims and his adverse proceedings for the purpose sought. When such fundamental propositions were decided it made no difference to what extent the administrative action in the decided case had progressed or in any other like contest already disposed of. It further could make no difference whether the claimants took any further administrative action or not because what had gone

before was void. The Secretary would here place the parties back in the various stages of the administrative proceedings where they were when the Department was stopped by the Virginia-Colorado case, and then start the machinery again and apply the doctrines of exhaustion of administrative remedies, etc. But, as stated above, the Supreme Court did more than interrupt the proceedings; it completely invalidated them as if no contests had commenced.

The Department proceeded initially on the proper course following the decisions as is shown in the record on this appeal. In many subsequent proceedings concerning other claims cancelled as these before us were, it ignored its prior administrative action; and it received applications to patent such claims, and patents were issued.

The land status in the area concerned has become somewhat complicated in that surface entries were received and processed; the Taylor Grazing Act has been administered in the same area as these and other claims of similar status; oil and gas leases have issued, and other entries have been processed by the Department. The Secretary advances this problem as an argument to support its refusal to patent, but these complications are not essentially different than in any area where there are a considerable number of unpatented mining claims. This is one of the Secretary's basic problems in administering lands where the general mining laws are applicable, and all the data as to the locations and claims may not be in the records of the Land Office. This involved land status is not the doing of the mining claimants, as the Department has proceeded to receive these other entries and to process them regardless of the unpatented claims. It is not a question of laches on either side. Time and the pressure for land utilization have com-

plicated the land use on the one hand and have added administrative problems on the other. The Secretary is certainly equal to solving these problems as they are everywhere present.

These cases on appeal are like a voice out of the past with mining locations dating from 1918, with the clearly established legal propositions directly applicable to them and the matter thought to be at rest, but here we are some thirty or thirty-five years later and having progressed, or at least moved, somewhat out of the pick and shovel era faced with the same issues as to the same claims. It is, as stated above, the Virginia-Colorado issues and era revisited.

The appellees urge that we consider a contention presented to the trial court that the Department cannot retroactively change a "rule." However it appears that the problem is a more fundamental one than rule making, and is instead a reluctance by the Secretary to continue to follow the Supreme Court's decisions as his predecessors have before, and to seek a new interpretation or to ultimately have the Court modify them. This issue we have considered above and we need not treat this as a separate matter.

The Government urges that the same issues are present in all four cases. The relief sought is basically in the nature of mandamus and directed to the Secretary's action in the Union Oil case. 28 U.S.C. § 1361 gives the District Court jurisdiction in these proceedings. The Act of 1962 subjected the officers and employees of the Government to such actions in all the United States District Courts. The nature of these actions was defined by this court in Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F. 2d 364 (10th Cir.). See also Smith v. United States, 333 F. 2d 70 (10th Cir.); Motah v. United States, 402 F. 2d 1 (10th Cir.); Pan American Petroleum Corp. v.

Pierson, 284 F. 2d 649 (10th Cir.); Couch v. Udall, No. 9834, December 4, 1968, —— F. 2d —— (10th Cir.). As the legislative history indicates the intent was only to broaden the venue provisions of the prior Act. U.S. Code Cong. & Ad. News, 87th Cong., 2d Sess., page 2785.

For the reasons indicated above we must hold that the Krushnic and Virginia-Colorado decisions of the Supreme Court control. These decisions must also be taken to mean that the prior cancellations for failure to do assessment work were void and are still void. Thus the Secretary was again without authority to attempt to base his actions on the same ground.

Affirmed.

APPENDIX B

No. 9581

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

THE OIL SHALE CORPORATION AND ENERGY RESOURCES TECHNOLOGY LAND, INCORPORATED, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Before Honorable ORIE L. PHILLIPS, Honorable DELMAS C. HILL and Honorable OLIVER SETH, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER,
Clerk.

By GLADYS E. HOBBS,
Deputy Clerk.

APPENDIX C

UNITED STATES DISTRICT COURT, D. COLORADO

CIV. A. Nos. 8680, 8685, 8691, 9202

THE OIL SHALE CORPORATION AND ENERGY RESOURCES TECHNOLOGY LAND, INCORPORATED, PLAINTIFFS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, DEFENDANT

JOSEPH B. UMPLEBY AND WASATCH DEVELOPMENT CO., PLAINTIFFS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, DEFENDANT

BARNETTE T. NAPIER, GRACE A. SAVAGE, JOAN L. SAVAGE, MAUDE B. FARNUM, ST. CLAIR NAPIER CATLIN, WILLIAM H. FARNUM, JR., JOHN R. FARNUM, JOHN W. SAVAGE, AND NEIL S. MINCER, PLAINTIFFS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, DEFENDANT

PENELOPE CHASE BROWN, INDIVIDUALLY AND AS TRUSTEE, AND THE OIL SHALE CORPORATION, PLAINTIFFS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, DEFENDANT

December 21, 1966

Memorandum opinion and order

WILLIAM E. DOYLE, *District Judge:* The four above-named actions arise under the Constitution and laws

of the United States. Plaintiffs in all four actions seek an adjudication that certain decisions of the Department of the Interior, hereinafter the Department, regarding oil shale placer mining claims in Colorado are erroneous, invalid and without force and effect. Plaintiffs in Civil Action Nos. 8685, 8691 and 9202 seek mandatory orders to compel the Department to issue patents on several placer claims pursuant to certain applications filed by plaintiffs. Plaintiffs in Civil Action No. 8680 have not filed a patent application, but seek a declaratory judgment regarding their alleged rights to gain patents from the Department on several of the Colorado oil shale mining claims. The trial was to the Court. Extensive trial and post-trial briefs have been filed, voluminous exhibits have been received in evidence, and oral arguments have been presented. The case now stands submitted.

There are few factual disputes. Most of the controversy concerns the policies of the Department and certain Supreme Court decisions relating to extensive oil shale reserves in Colorado, Utah and Wyoming. For the sake of clarity, the position of the plaintiffs in each of the consolidated cases will be summarized at the outset. The specific facts surrounding the claims in the several actions are related so as to clarify the issues and furnish basis for the decisions.

Civil Action No. 8680

Plaintiffs, The Oil Shale Corporation and Energy Resources Technology Corporation, Inc. are, respectively, Nevada and Colorado corporations. Energy Resources allegedly owns certain oil shale mining claims, referred to as the Group A Bute Claims (officially entitled Bute Placer Mining Claims Nos. 1–19, inclusive, 21–28 inclusive, and 30–32 inclusive). The Oil Shale Corporation allegedly owns the Group B

Bute Claims (officially entitled Bute Placer Mining Claims Nos. 33–48, inclusive), the Camp Bird Claims (officially entitled Camp Bird Placer Mining Claims Nos. 1–20, inclusive) and the Atlas Claims (officially, the Atlas Placer Mining Claims Nos. 1, 2, 3, 7, 9, 10, 12, 17, 18). All of these claims are located in Rio Blanco County, Colorado; all allegedly contain valuable oil deposits.

Plaintiffs trace their interests in these claims through one Tell Ertl who, during the 1950's, acquired them from the original claimants and their successors in interest by purchase and forfeiture proceedings under Title 30 U.S.C. § 28. Hamilton v. Ertl, 146 Colo. 80, 360 P.2d 660 (1961). All of the claims were allegedly located by the original claimants during December, 1919 and January, 1920. Thus they predate enactment of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, Title 30 U.S.C. § 181 et seq. This act changed the mining law policy in that certain mineral lands were withdrawn from location.

In 1927, the Department instituted certain contest proceedings, Contest Nos. 11,757, 11,759 and 11,761 against the original claimants regarding the above mining claims. On May 4, 1928, the Commissioner, General Land Office, issued letter decisions declaring the claims null and void for the failure of the named contestees to appear upon notice and process purportedly served and answer charges alleging their failure to perform annual assessment work for the years ending July 1, 1921 to 1927, inclusive, as required by 30 U.S.C. § 28.

Plaintiffs contend that the Supreme Court has, on two occasions, held that the Department lacked authority to declare mining claims null and void for failure to perform annual assessment work. Wilbur

v. United States ex rel. Krushnic, 280 U.S. 306, 50 S. Ct. 103, 74 L. Ed. 445 (1930); Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639, 55 S. Ct. 888, 79 L. Ed. 1627 (1935). Their further contention is that in any event the contestees were not given proper notice of the contest proceedings. They allege that following the Supreme Court's decisions in Wilbur v. United States ex rel. Krushnic, supra, and Ickes v. Virginia-Colorado Development Corporation, supra, the defendant's predecessors in office and various officials and employees of the Department repeatedly and publicly affirmed that the decisions in the assessment work contest proceedings, including Contests Nos. 11,757, 11,759 and 11,761, were null and void; that from 1935 until 1962, the defendant and his predecessors in office issued land patents covering at least 74,000 acres of oil shale claims which had been declared null and void in assessment work proceedings such as those here involved, and which were in all respects of fact and law the same as the mining claims referred to above in which plaintiffs allege to have an interest. Plaintiffs argue that by reason of these acts the Department has adopted a rule of law, which cannot be retroactively altered, that the assessment work contests had no effect on the validity of mining claims. It is further alleged that the plaintiffs and their predecessors in interest have relied upon the rule of law purportedly adopted by the Department.

In 1962, plaintiff Energy Resources and others applied for patents on certain mining claims which had been the subject of departmental contest proceedings during 1930–1933 involving issues identical to those raised in Contest Nos. 11,757, 11,759, and 11,761. On February 16, 1962, the Manager of the Colorado Land Office, Bureau of Land Management, issued an opinion

rejecting the applications on the ground that while the original cancellations may have been erroneous as a matter of law at the time they were made, the principles of finality of administrative action, estoppel by adjudication, and *res judicata* prevent their now being challenged and consequently bar the patenting of such claims. The Manager's decision was affirmed by the Solicitor of the Department on April 17, 1964. Union Oil Company of California, et al., 71 I.D. 169 (1964). The plaintiffs assert that they have exhausted their administrative remedies and that the case is now ready for judicial review. They seek a mandatory injunction compelling the Department to expunge from Department records any decisions, orders, judgments or cancellations entered with respect to the mining claims of plaintiffs in Contests Nos. 11,757, 11,759 and 11,761. They also seek a declaratory judgment declaring such contest proceedings to be of no effect, and an injunction barring the Department from relying upon them to bar their patent applications, and any further relief appropriate.

CIVIL ACTION No. 8685

Plaintiffs Umpleby, a Texas citizen, and Wasatch Development Company, a Colorado corporation, seek similar relief in regard to certain mining claims in Garfield County, Colorado, known as the Carbon and Elizabeth claims. Plaintiff Umpleby is a successor in interest from the original claimants and the alleged owner of an undivided thirteen and one-half per cent interest in the unpatented Carbon Nos. 1 through 6 and Elizabeth Nos. 1 through 12 oil shale placer mining claims. Plaintiff Wasatch Development Company is a successor in interest from the original claimants and the alleged owner of an undivided eighty-six and one-half per cent interest in these claims. The claims were

allegedly located in 1918, prior to the enactment of the Mineral Leasing Act.

These claims were also the subject of a contest proceeding, Contest No. 12029, initiated by the Department against Umpleby and others in 1929, in which they were declared invalid for failure to perform annual assessment work. On September 8, 1959, plaintiffs filed application for mineral patent (Colo. 030979) on the Carbon Nos. 1 through 4 and Elizabeth Nos. 1, 2, 4 through 12 claims. In Union Oil Company of California, et al., supra, the Land Office Manager's rejection of this patent application was affirmed by the Solicitor. Plaintiffs make assertions similar to those made by plaintiffs in Civil Action No. 8680. They seek a declaration that the *Union Oil Company* decision is void because of the Supreme Court's decisions in Wilbur v. United States ex rel. Krushnic, supra, and Ickes v. Virginia-Colorado Development Corporation, supra, and the Department's subsequent affirmance thereof, and pray for a mandatory injunction compelling the Department to take such action as is necessary to issue patents to them.

CIVIL ACTION No. 8691

In this action, plaintiffs Napier and Grace Savage are California citizens, and plaintiffs Joan Savage, M. B. Farnum, Catlin, W. H. Farnum, J. R. Farnum, John Savage and Mincer are Colorado citizens. Plaintiffs are successors in interest and the alleged owners of three oil shale placer mining claims in Garfield County, Colorado, known as the Northwest, Northeast and Southeast claims. These claims were allegedly located by plaintiffs' predecessors in 1918, prior to the enactment of the Mineral Leasing Act. They also were the subject of a contest proceeding, Contest No. 12972, initiated by the Department in 1931, wherein the

claims were declared invalid for failure to perform annual assessment work. On June 1, 1959, the plaintiffs applied for a patent on the claims involved here. This application was also rejected by the Manager of the Colorado Land Office and affirmed by the Solicitor, Union Oil Company of California, et al., supra. Plaintiffs also contend that this decision is contrary to law and the settled practice of the Department. They seek a mandatory injunction compelling the Department to take such action as is necessary to issue the patents applied for, and a judgment declaring the departmental decisions adversely affecting their claims to be null and void, and other appropriate relief.

CIVIL ACTION No. 9202

Plaintiff Brown is a Colorado citizen, and is the successor in interest and the alleged owner of certain oil shale placer mining claims in Garfield County, Colorado, known as the Oyler claims (officially the Oyler Oil Shale Placer Mining Claims Nos. 1–4). Plaintiff The Oil Shale Corporation is a Nevada corporation holding a lease and option to purchase the Oyler claims. The Oyler claims were allegedly located in 1916, prior to the enactment of the Mineral Leasing Act. They too were the subject of departmental investigations and contest proceedings prior to the Supreme Court's decision in Ickes v. Virginia-Colorado Development Corporation, supra. The Department concluded from an investigation in 1918 that the claims had been properly located. A second investigation in 1920 affirmed the continued validity of the claims. In 1929, a contest proceeding, Contest No. 12039, similar to those discussed above, resulted in a declaration invalidating the claims for failure to perform annual

assessment work. In 1948, the sole surviving directors of the then record title holder of the claims, the Index Shale Oil Company, a dissolved corporation, conveyed the claims to plaintiff Brown and her husband. In 1955, the Browns conveyed the claims to the Pacific Oil Company, which filed a patent application in September of the same year, Colorado No. 012327. This application was also rejected by the Manager of the Colorado Land Office on February 16, 1962, and affirmed by the Solicitor in Union Oil Company of California, et al., supra. Apparently as a result of the Land Office Manager's decision in 1962, the Pacific Oil Company reconveyed the claims to plaintiff Brown. The lease-option agreement with plaintiff The Oil Shale Corporation was executed thereafter. Plaintiffs here make the same assertions and seek similar relief to that asked by plaintiffs in Civil Action No. 8680.

In summary, the plaintiffs assert at least three separate and independent reasons for according the relief sought in these consolidated actions:

1. The 1928–1933 contest proceedings of the Department are void for lack of jurisdiction and can give no basis for the *Union Oil* decision on any theory.

2. In 1935, the Department adopted a rule that the 1928–1933 contest decisions would be regarded as void and without force and effect and this rule cannot be reversed retroactively.

3. Even if the 1928–1933 decisions are regarded as merely erroneous, but supported by subject matter jurisdiction, the plaintiffs in the circumstances above described can now seek direct review and obtain their reversal.

THE ASSESSMENT WORK ISSUE: DEPARTMENTAL VIEW PRIOR TO THE KRUSHNIC AND VIRGINIA-COLORADO DECISIONS

The Department's broad power over the public lands gives it an undisputed jurisdiction over most aspects relating to the validity of mining claims, e.g., marking of claims, discovery, mineral character of the land, particularly when a patent application has been filed. Cameron v. United States, 252 U.S. 450, 40 S. Ct. 410, 64 L. Ed. 659 (1920); Best v. Humboldt Placer Mining Company, 371 U.S. 334, 83 S. Ct. 379, 9 L. Ed. 2d 350 (1963). In view of the scope of its acknowledged powers, the Department has, in recent decades, been reluctant to accept the proposition that it lacks power to question the sufficiency of assessment work performance in order to take possession of claims for the Government where such work is in default.[1] Under the mining laws, the penalty for failure to do assessment work traditionally has been that other *private* parties are empowered to enter onto the lands and relocate the claim. E.g., Belk v. Meagher, 104 U.S. 279, 26 L. Ed. 735, 736 (1881); Swan-

[1] That a distinction has been made between the Department's power to invalidate claims for non-performance of assessment work and its power to do so for other defects is illustrated by the following extract from The Federal Shale Oil Company, 53 I.D. 213, 216 (1930):

"Putting aside for the moment the question, whether departmental authority exists to attack mining claims for failure to do annual work, it can not be disputed that such authority exists to determine whether a valid claim was initiated prior to the date of the act by doing the acts the mining law prescribed, such as marking the boundaries so that they might be readily traced, making a discovery of mineral prior to the act, or thereafter as a result of work diligently in prosecution at its date."

son v. Sears, 224 U.S. 180, 32 S. Ct. 455, 56 L. Ed. 721 (1912); Knight v. Flat Top Mining Co., 6 Utah 2d 51, 305 P. 2d 503 (1957). Where there are co-owners to a mining claim, one co-owner can, by performing assessment work where the others do not, obtain complete ownership of the claim through forfeiture proceedings under 30 U.S.C.A. § 28. Hamilton v. Ertl, supra. In recent years, the Department has asserted its thesis that relocation for assessment work default is also a remedy available to the Government, and within its jurisdiction. But this has not always been its position.

In an early decision, P. Wolenberg, et al., 29 L.D. 302 (1899), the Secretary of the Interior recognized that the Department had no jurisdiction under the pre-Mineral Leasing Act mining laws to inquire into a charge of failure to perform assessment work. The Secretary reviewed the action of the Land Office Commissioner in ordering a hearing to determine whether annual assessment work had been performed on a contested claim. In vacating the order for a hearing on this question the Secretary made the following comments:

> "Ordinarily an order of your office directing a hearing, being an interlocutory proceeding, will not be disturbed upon appeal. Indeed, generally speaking, such an order is not appealable. This rule, however, is not without exception, and where it is made to appear that the order involves matters which the land department can not *inquire into* * * * the same may be considered and corrected or wholly vacated when brought to the attention of the Department, whether by direct appeal or otherwise.
>
> "In the present case the order for a hearing, in so far as it directs an *inquiry* into the charge of failure to make an expenditure of one hundred dollars, in labor or improvements, on the

Mascot claim during the year 1896, and the alleged relocation of the claim by reason thereof, clearly relates to matters over which the land department is *without authority*. The annual expenditure of one hundred dollars, in labor or improvements, required by section 2324 of the Revised Statutes, is solely a matter between rival and adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts, and not to the land department. In this respect the requirement made by section 2324 is essentially different from that made by section 2325, which makes the expenditure of five hundred dollars, in labor or improvements, a condition to the issuance of patent, and therefore a matter between the applicant for patent and the Government, the determination of which is committed to the land department. * * *

"The action of your office in *ordering a hearing* to determine whether the annual assessment work for 1896 had been done upon the Mascot, and, if not, whether work upon that claim had been resumed before the alleged relocation thereof, was erroneous." 29 L.D. at 303–04.

See also Barklage et al. v. Russell, 29 L.D. 401 (1900); Nielson v. Champagne Mining & Milling Co., 29 L.D. 491 (1900); Cain et al. v. Addenda Mining Co. (On Review), 29 L.D. 62 (1899).

Following these early decisions the Department took a different view in cases involving the right of mining claimants to lands subsequently withdrawn or reserved from mining locations. Thus, in Navajo Indian Reservation, 30 L.D. 515 (1901), the Department held that a valid mining location subsisting at the time of the reservation of lands as an Indian Reservation was excepted from the effect of the withdrawal and that such claim was subject to relocation upon failure of the original claimant to perform

annual assessment work. The Secretary refused to determine whether the original locators had defaulted, and whether the alleged relocators had succeeded to their rights, holding this to be a matter for the courts. However, he did consider the effect of the withdrawal upon the subsequent default of prior claims. Depending upon how the reservation was worded, the Secretary concluded, it might attach upon default of an existing claim so as to prevent relocation or it might never attach, regardless of the subsequent default. If, for example, the reservation did not flatly *exclude* the prior claims, but merely exempted them for so long as they are properly "maintained," a default in such "maintenance" would bring the land under the withdrawal and hence under the control of the Government.

The effect of a withdrawal under the reclamation act for irrigation works, 32 Stat. 388, was considered in a Departmental Instruction dated January 13, 1904, 32 L.D. 387. The Secretary noted that an unperfected mining claim is merely a possessory right which is liable to be divested for failure to maintain the claim in accordance with the mining laws and local regulations applicable thereto. He then stated that the land department has jurisdiction to determine whether the claimant has defaulted and to declare by its judgment whether such right has been divested so as to restore the land to the control of the Government. A decade later, in E. C. Kinney, 44 L.D. 580 (1916), this principle was followed to support the asserted jurisdiction of the Department to determine whether placer mining claims on withdrawn lands were subsequently defaulted for failure to perform annual assessment work. In referring to the January 13, 1904, Instruction, the Assistant Secretary said:

> "This is undoubtedly the true rule, for where a claimant is in default so that his claim could be defeated by another individual adverse claimant, surely the Government, desiring to devote the land to an important public use, may likewise take advantage of the default and divest the claim so as to free the land for Government use." 44 L.D. at 582.

As has been mentioned, the Mineral Leasing Act of 1920 instituted a new policy with respect to certain minerals, including oil shale, by withdrawing them from location and patent. After its enactment, many prior locators ceased doing annual assessment work on claims for minerals included under the Act on the ground that if such claims could no longer be located, neither could they be *re*located. An investigation by the Department after the enactment of the Leasing Act showed that work had stopped on many claims. Many contests were initiated alleging that failure to perform the work resulted in forfeiture of the claims to the United States. In bringing these contest proceedings the Department took the position that its jurisdiction to inquire into the validity of mining claims was enhanced by the new policy propounded by the Act. The Department reasoned that the provision of Section 37 of the Act, excepting from its coverage valid existing claims thereafter "maintained in compliance with the laws under which initiated," impliedly gave the Secretary the authority to determine what lands are subject to lease and what lands are within the exception of valid claims. In the Department's view, maintenance "in compliance with the laws under which initiated" included the performance of annual assessment work; hence, the Secretary's implied authority to determine what claims fell within the exception necessarily gave him jurisdiction to invalidate claims for nonperformance of such work.

The leading Department case enunciating this viewpoint was Emil L. Krushnic, 52 L.D. 295 (1929). There, the petitioner's application in 1922 for patent to certain oil shale placer claims was denied for failure to perform assessment work during 1920, although he had resumed such work in 1921 and 1922. The Commissioner ruled that to maintain a claim "in compliance with the laws under which initiated means, among other things, the performance of $100 worth of annual labor and improvement prescribed by section 2324, Revised Statutes * * *," and that failure to fulfill this requirement *automatically* terminated the claim and rendered it subject to disposition only under the Leasing Act. In affirming the Commissioner the Secretary emphasized the automatic nature of the termination upon default in performing the yearly labor.

> "Section 37 [of the Leasing Act] at one blow destroyed the right of relocation of such minerals and with it fell the right of resumption. * * * The fair and obvious meaning of section 37 is that if the annual work is not done, all the rights of the claimant *are* gone."
>
> * * * * * * *
>
> "The contention that the Federal Government must act the part of an adverse claimant in this and similar cases and be alert and vigilant and take some affirmative action to terminate the rights of a defaulting claimant before he resumes work, such as by physical reentry, or institution of adverse proceedings in the department or by bringing an ouster suit in the courts, is untenable." 52 L.D. at 297, 301–03.

Since he viewed the forfeiture to be automatic, immediately vesting the Government with complete con-

trol and ownership of the land, the Secretary was able to distinguish between the Department's jurisdiction under the general mining laws to settle disputes over assessment work performance between private adverse claimants and its jurisdiction under the Leasing Act to invalidate claims on its own initiative for failure to perform the annual labor.

> "The situation here is entirely different. The leasing act, as stated, repealed as to shale deposits the general provisions of the mining law and withdrew them from location and disposition thereunder and was a legislative assertion of control and ownership thereof by the United States, except as specifically provided in section 37 of the act. It is the duty of the department to scrutinize claims that are asserted to be within the exceptions and ascertain whether the government or the individual has the better right. The question is one of validity, and under section 37 maintenance is an essential element of validity. Only controversies between adverse claimants under conflicting mining locations of the same land, and which relate solely to the right of possession are committed exclusively to the courts. * * *" 52 L.D. at 303.

Following this ruling in *Krushnic* the land office instituted numerous assessment work contests. Annual Report of the Secretary of the Interior, Fiscal Year 1928, page 11. Included in these proceedings were Contest Nos. 11757, 11759, 11761, 12029 and 12039, regarding the placer claims in Civil Actions Nos. 8680, 8685 and 9202. Meanwhile, however, *Krushnic* found its way to the Supreme Court. The decision of the Department was there reversed. The Supreme Court ruled that the Secretary's decision that cessation of assessment work automatically terminates the claim "violates the plain words of the excepting clause of

the Leasing Act." Wilbur v. United States ex rel. Krushnic, supra, 280 U.S. at 318, 50 S. Ct. at 105. The reasoning was that while performance of annual labor "maintains" a claim,

> "the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened * * *" 280 U.S. at 317–18, 50 S. Ct. at 105.

Failure to perform assessment work on a claim located prior to the leasing act, the court concluded, only renders it subject to loss by relocation and is *without effect* so far as the Government is concerned.

> "The owner [of a mining claim] is not required to purchase the claim or secure patent from the United States; but, so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation.
>
> "Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omit-

ted. P. Wolenberg, et al., 29 L.D. 302, 304; Nielson v. Champagne Mining & M. Co., 29 L.D. 491, 493, 280 U.S. at 317, 50 S. Ct. at 104–05.

The decision in *Krushnic* did not put at rest the problem of jurisdiction, at least not for the Department. The Department's interpretation was that it prohibited the Government's invalidating mining claims for failure to perform assessment work only where the claimant has resumed the assessment work before "some form of challenge on behalf of the United States to the valid existence of the claim has intervened."[2] The Department then undertook to investigate the validity of oil shale claims upon which assessment work had stopped and had not been resumed. It posted a notice on each such claim. This declared that the United States had taken possession of the land for its exclusive use and benefit. Numerous such notices were posted; many contest proceedings were instituted; and many claims covering hundreds of thousands of acres were declared null and void. Annual Report of the Secretary of the Interior, Fiscal Years 1930, p. 14; 1931, p. 65; 1932, pp. 18, 58; 1933, p. 60.

> "It is the department's view that a challenge of an oil shale claim which is in default for the nonperformance of assessment work, by notice of the preferment of a charge against the claim to that effect in a proceeding instituted in accordance with the regulations of February 26, 1916, Circular No. 460 (44 L.D. 572), while such

[2] The Federal Shale Oil Co., 53 I.D. 213, 220 (1930). See also, Francis D. Weaver, 53 I.D. 175 (1930), On Rehearing, 53 I.D. 179 (1930); Virginia-Colorado Development Corporation, 53 I.D. 666 (1932); State v. Madell, 53 I.D. (1930); Instructions, Government Proceedings Against Oil Shale Claims for Default in Assessment Work, 53 I.D. 131 (1930).

> default continues to exist, and a judgment by the department that the charge is sustained after due notice and opportunity to be heard, has the same effect in the extinguishment of the claim as would a valid relocation of a mining claim located on account of minerals other than those mentioned in the leasing act." The Federal Shale Oil Company, supra, 53 I.D. at 221.

On April 1, 1933, the Department suspended these actions to await "court decisions on [the] jurisdiction of the Department to challenge the validity of oil shale locations for failure to perform annual labor thereon." Annual Report of the Secretary of the Interior, Fiscal Year 1934, p. 65. The litigation referred to was culminated in the Supreme Court's decision in Ickes v. Virginia-Colorado Development Corporation, supra.

In *Virginia-Colorado,* the Court reviewed a decree requiring the Secretary of the Interior to vacate certain adverse proceedings together with his decision declaring certain placer claims of the plaintiff in that case to be void. Plaintiff had alleged that he had located oil shale placer claims on mineral lands of the United States in Colorado in June, 1917. Annual assessment work had been performed for each year through July 1, 1930, but none had been done during 1931 when the Department initiated adverse proceedings challenging the claim for nonperformance of the work and failure to resume prior to the contest proceedings.

The Supreme Court affirmed this decree and in so doing the opinion by Mr. Justice Hughes, declared and clarified several points.

First, the decision reaffirmed the holding in *Krushnic* as to the character of the right acquired. On this it quoted:

"* * * Restating the rule declared by many decisions, we said in Wilbur v. U.S. ex rel. Krushnic, 280 U.S. 306, 316, 50 S. Ct. 103, 104, 74 L. Ed. 445, that such a location, perfected under the law, 'has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term.' It is alienable, inheritable, and taxable."

Secondly, it again spelled out the extent of the Department's authority as follows:

> "There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. [Citing cases]
>
> "The Leasing Act of 1920 inaugurated a new policy. Instead of the acquisition of rights by location, the act provided for leases. But by express provision, the act saved existing valid claims 'thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws.' Section 37 of the Act (30 U.S.C.A. § 193). What then was the status of plaintiff's claims under this exception? They were originally valid claims. No question is raised to the contrary. There is no suggestion of lack of discovery, fraud, or other defect. There is no ground for a charge of abandonment. The allegations of the bill, admitted by the motion to dismiss, dispose of any such contention. Plaintiff had lost no rights by failure to do the annual assessment work; that failure gave the government no ground of forfeiture. Wilbur v. U.S. ex rel. Krushnic, supra."

Thirdly, it was held that the Saving Clause (Section 37 of the Leasing Act) preserved all rights acquired prior to the enactment of the act, and that the reservation did not enlarge the Department's authority. On this it said:

> "In this view, plaintiff came directly within the exception. The government invokes the new policy of the Leasing Act abolishing the practice of location. But the saving provision of section 37 is a part of the policy of the act. Its terms explicitly declare the will of Congress as to valid existing claims, with full understanding of the status of such claims under the prior law.
>
> "The government refers to the reservation in the opinion in Wilbur v. U.S. ex rel. Krushnic, supra, as to the maintenance of a claim by a resumption of work 'unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened.' But that was a reservation, not a decision, and it does not aid the government in its contention here. To be effective, the 'challenge' to the 'valid existence' of a claim must have some proper basis. No such basis is shown."

The Court's conclusion was that "the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law."

Soon after the decision of the Supreme Court in *Virginia-Colorado,* the Department issued its opinion in The Shale Oil Company, 55 I.D. 287 (1935). This in a sense implemented the Supreme Court's ruling. The appeal to the Secretary was from a Commissioner's denial of patent application. The contention was that the Land Department was without jurisdiction and without legal authority to question a placer claim owner's failure to perform assessment work for any year. The First Assistant Secretary reversed the decision and remanded the case with instructions to reinstate the application and to dispose of it unaffected by default in the performance of assessment labor. In commenting on the *Virginia-Colorado* opinion the Assistant Secretary noted that "the challenge to the valid

existence of the claims had no proper basis; and that the Department's challenge, its adverse proceedings and the decision set forth in the Bill went beyond the authority conferred by law."

The Assistant Secretary went even further; he concluded that: "The above-mentioned decisions in the cases of *Francis D. Weaver* and *Federal Oil Shale Company* and other departmental decisions in conflict with this decision are hereby overruled."

Thus, the Department not only clearly recognized its lack of authority to deal with the assessment work problem in the case before it, but also it cleared the record by overruling all prior inconsistent decisions.

There are other evidences that this was and continued to be the viewpoint of the Department many, many years following the *Virginia-Colorado* decisions. The viewpoints of various officials, reflected in the correspondence, show that they believed that prior decisions forfeiting claims for failure to do assessment work were void.[3]

---

[3] Letter of Secretary Lane dated October 23, 1918:

"I am in receipt of your letter dated October 2, 1918, and making inquiry as to the necessity for performing annual assessment work on some oil shale lands in Wyoming, which you and associates are claiming under placer mining locations made in 1917 and 1918.

* * * * *

"As a general rule matters involving questions of assessment work on mining claims arise between adverse claimants to the same mineral land and go only to the right of possession, the determination of which is committed exclusively to the courts."

Letter of First Assistant Secretary Vogelsang dated January 20, 1919:

"The annual expenditure on unpatented mining location required under Section 2324 U.S. Revised Statutes, and commonly called annual assessment work, is, with the exception of certain phosphate locations affected by a special act of Congress, solely a matter between rival or adverse claimants to the same

The regulations governing the Bureau of Land Management recognize this proposition also. See 43 C.F.R. § 3420.4 (1966). It provides:

"The annual expenditure of $100 in labor or improvements on a mining claim, required by

---

mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts. In other words, the non-performance of assessment work renders the land subject to adverse relocation provided work is not resumed (40 Stat. 343)."

Letter from Commissioner Fred W. Johnson dated June 28, 1935:

"It is possible if you left your claims in 1925 and have not since performed assessment work thereon that they have been relocated, but as also stated in the paragraph referred to, 'The determination of the question of the right of possession between rival or adverse claimants to the same mineral land is committed exclusively to the court.' Matters of trespass, thievery, etc., such as those referred to in your letter, are also committed to the jurisdiction of the court, being punishable only under the laws of the state. As this office has no jurisdiction in the matters mentioned in your letter it will not undertake to advise you in that regard."

Letter from Commissioner Johnson dated July 25, 1935:

"Replying to your letter of July 20, 1935, you are advised that this office has no jurisdiction over questions relating to the performance of annual assessment work on mining claims, such questions being committed exclusively to the courts."

Letter from Under Secretary Chapman dated February 11, 1946:

"The failure to perform the annual assessment work for the benefit of a valid mining location has no effect as against the United States but only renders the claim subject to loss through relocation by another claimant if the work is not commenced or resumed before such relocation. Therefore, the question of whether the work done is of a nature that would be considered assessment work is not one within the jurisdiction of this Department but is for the appropriate court to determine should litigation arise between the claim holder and another claimant making a relocation of the same ground. See Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 [55 S. Ct. 888]."

See also, The Shale Oil Company, supra, pp. 20–21.

section 2324 of the Revised Statutes (30 U.S.C. § 28), is, with the exception of certain phosphate placer locations, validated by the act of January 11, 1915 (38 Stat. 792; 30 U.S.C. 131), under which regulations were issued March 31, 1915 (Circ. 396), 44 L.D. 46, solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts."[4]

Similarly, the annual reports of the Secretary of the Interior also reflected the Department's view in this regard.[5] Moreover, the commentators have generally regarded the question as one of jurisdiction.[6]

UNION OIL COMPANY DECISION

We turn now to consideration of the case which marked a reversal of the Department's viewpoint and attitude. In *Union Oil* a number of applicants

[4] See also 37 L.D. 757, 769 (1909); 49 L.D. 15, 73 (1922) showing similar versions of the quoted regulation.

[5] See Report of the Secretary of the Interior, Fiscal Year 1934, page 65, and see also the Statement of Secretary Wilbur before the Senate Committee on Public Lands, given on February 12, 1931.

[6] E.g.:

"Assessment work upon oil-shale claims is governed by the rules of the general mining law and the claimant of a valid location prior in time to the passage of the Leasing Act is not subject to any forfeiture that did not apply to such law. In other words, fulfillment of the annual ownership work each year is not a prerequisite to continuing ownership as against the Government of the United States, and, in the absence of an adverse relocation, work may be resumed at any time." Division of Mines, California Department of Natural Resources, American Mining Law, Vol. 1, § 1051 (1943);

"Only a mining relocation can effect forfeiture, and the Federal Government cannot question the failure to perform assessment work." 2 American Law of Mining, § 7.26 (1964).

for patents to oil shale placer mining claims which had been declared null and void in the contest proceedings during 1930–1933 sought to have patents issued. The Manager of the Land Office denied these efforts. The Secretary, in his exercise of supervisory jurisdiction, submitted the case to the Solicitor of the Department for final decision. The Manager's decision was, of course, affirmed notwithstanding that the Solicitor recognized the invalidity of the 1930–1933 rulings. He noted that failure to perform annual assessment work was not a ground for cancellation of oil shale placer claims by the Government. 71 I.D. at 170. He held, however, that even though the original cancellations were incorrect in law, that nevertheless under the principles of finality of administrative action, estoppel by adjudication, and *res judicata*, these rulings could not be challenged in the year 1962.

The Solicitor's basic assumption in the *Union Oil* decision was that the Supreme Court had not denied the Department's jurisdiction with respect to the subject matter. He also construed *The Shale Oil Company* case, supra, which had overruled all inconsistent decisions, as not reinstating the claims previously declared forfeited. In essence, he determined that the applicants were required to take action to nullify these rulings at the time and that their failure to exercise this initiative constituted something in the nature of an implied acquiescence. The important emphasis in the decision was placed on administrative finality and *res judicata*. Since this decision stands in the way of a recognition of the plaintiffs' rights, we must consider and determine its validity in the light of the Supremt Court decisions and the narrow question is whether the Department had subject matter jurisdiction with respect to performance or nonperformance of assessment work. In support

of his holding that there was such jurisdiction, the Solicitor pointed to the language in *Virginia-Colorado* to the effect that the Secretary had authority by appropriate proceedings to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. From this he concluded that the Department at all times retained jurisdiction; that is, power over these claims. As we view it, this was an unjustified interpretation of the decisions of the Supreme Court. It overlooked the basic nature in terms of property of a mining location. Both *Krushnic* and *Virginia-Colorado* proceeded on a fundamental proposition that this creates a vested property right which can be defeated only by a competitor. Historically, this was the nature and character of the mining claim, and to overlook it is to change a fundamental rule of property. No amount of administrative legerdemain can overcome this fundamental principle.

It is, of course, so fundamental as to require no documentation, that an adjudication by a tribunal lacking subject matter jurisdiction is wholly nugatory, need not be appealed, and can not be *res judicata*. When, as here, the Department acted beyond the authority granted to it by the law, it acted in the particular area beyond its jurisdiction. The Supreme Court told the Department this in language as plain as legal language can be. If *Krushnic* left some unresolved question, *Virginia-Colorado* did not. It is clear from a reading of this opinion that the Court was speaking on the question of the Department's jurisdiction. As to pre-1920 locations, the Court held that they retained the legal status which they had enjoyed prior to the adoption of the Leasing Act. Both of these cases rule that prior to the adoption of this Act the performance of assesssment work

was unnecessary to the preservation of the locator's possessory right against the Government.

Virginia-Colorado clarified beyond question the proposition that the Government has never had a possessory right to pre-Leasing Act mining claims defective only for failure to perform assessment work. It follows from this that the Department is wholly without jurisdiction to inquire into the status of assessment work performance.

It is also noteworthy that there has been no contention here that plaintiff's have abandoned their claims and there is a dearth of evidence to establish acquiescence, express or implied, by plaintiffs in any assumption of jurisdiction by the Department.

It follows, therefore, that the decision in *Union Oil* is contrary to and irreconcilable with the decisions of the Supreme Court of the United States. In so holding we recognize that the Department of the Interior is in good faith advancing a policy. Congress has, of course, granted the Department broad powers to protect public lands and the Department undoubtedly considers itself duty-bound to oppose the instant claims. This Court, however, must follow the law as laid down by the Supreme Court of the United States. It is upon this basis that we conclude that the actions of the Department in assuming jurisdiction over the failure to do assessment work is void and of no effect whatever.

The plaintiffs are directed to submit forms of judgments reflecting the views expressed in this opinion. These judgments should be submitted to defendant for approval as to form.

APPENDIX D

UNION OIL CO. OF CALIFORNIA ET AL.

No. A–29560

Decided April 17, 1964

APPEAL FROM LAND OFFICE DECISIONS

The Union Oil Company of California and others [1] have each appealed to the Director of the Bureau of Land Management from decisions of the Manager of the Colorado Land Office issued on February 16 and 23, 1962. These decisions rejected mineral patent applications for oil shale placer mining claims on lands in Garfield and Rio Blanco Counties, Colorado. The Secretary assumed supervisory jurisdiction because of the importance of the issues involved and assigned the case to the Solicitor for final decision.[2] Since the facts out of which these appeals arise are identical or similar and, since all of the claims involve identical issues and common questions of law, the appeals will be considered together.

The Manager rejected each of the patent applications under consideration on the ground that appellant's mining claims had been declared null and void in adverse proceedings brought by the Government between 1930 and 1933 on the charge of failure to perform annual assessment work. In 1935, in a case not involved in this appeal, the Supreme Court held

[1] The appeal numbers, the names of the appellants, the serial numbers of their patent applications, and the dates of the decisions appealed from are set forth in Appendix A.

[2] Memorandum of the Secretary, May 8, 1962.

that failure to perform annual assessment work was not a ground for cancellation of oil shale placer claims by the Government. *Ickes* v. *Virginia-Colorado Development Corporation,* 295 U.S. 639 (1935). The basis of the Manager's decisions in the present cases was not that the original cancellations were correct as a matter of law at the time they were made, but rather, that "under * * * principles of finality of administrative action, estoppel by adjudication, and *res judicata* * * *," they cannot now be challenged.

As a preliminary matter, the appellants have joined in a motion to vacate the Colorado Land Office Manager's decisions or, in the alternative, to remand these cases for full hearing, after notice, of matters of fact and law relied upon by the Manager in rendering his decisions. The motion is based on assertions which, for the most part, raise the same issues involved in the appeal. The issues raised in the motion will, therefore, be disposed of in this opinion together with the issues raised by the appellants on the appeal.

The decisions of the Land Office Manager are first attacked on the ground that the Department was required by law and regulation to provide a hearing on the questions of fact and law decided by the Manager. It is further asserted that the Manager exceeded his authority in that the decisions rendered by him were tantamount to an adjudication of the validity of the appellant's mining claims, no hearing having been held. This, appellants contend, operates to deprive them of due process of law.

The assertion is then made that the cancellations upon which the Manager based his decisons were of no effect since the Department never obtained personal jurisdiction over the contestees in the original proceedings and, in fact, never actually canceled some

of the claims upon which the present appellants base their applications.

Assuming, *arguendo,* that the Land Office Manager had the authority to decide these cases without providing a *de novo* hearing in each case, the appellants assert that the principles upon which the Manager based his decision are not controlling here. They contend that, so long as he retains jurisdiction over the lands in question, the Secretary may, in the exercise of his supervisory authority, vacate any decision subsequently found to be in error even though the time within which an appeal could be prosecuted has expired. This, the appellants contend, is what occurred when the Secretary decided *The Shale Oil Company,* 55 I.D. 287 (1935), which "overruled" prior departmental decisions canceling oil shale placer claims for failure to perform annual assessment work.

Next, the appellants contend that the doctrine of *res judicata* is not applicable to administrative decisions.

The appellants further assert that the principles of finality of administrative action, estoppel by adjudication and *res judicata* are inapplicable in the present case since the Supreme Court, in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* held that the cancellation of a mining claim upon ground of failure to perform annual assessment work was beyond the jurisdiction and power conferred by law upon the Secretary and that such cancellation is now subject to collateral attack.

Finally, the appellants contend that since *Ickes* v. *Virginia-Colorado Development Corporation, supra,* and *The Shale Oil Company, supra,* the Department has consistently treated the early decisions of the Land Commissioner as being void and of no legal

effect and has at all times prior to February 1962, recognized the validity of the appellants' claims.

EARLY DEPARTMENTAL DECISIONS AND POLICY

Before considering the appellants' contentions, the early decisions and departmental policy regarding oil shale placer claims will be examined briefly.

Prior to 1920, the Department of the Interior held that failure to perform annual assessment work on mining claims[3] rendered the land subject to relocation by others but did not constitute grounds for the Government to cancel such claims. *P. Wolenberg,* 29 L.D. 302 (1899). Thereafter, all oil shale lands were withdrawn from location by the Mineral Leasing Act of February 25, 1920 (41 Stat. 451, 30 U.S.C., sec. 193), subject to the rights of owners of valid mining claims "thereafter maintained in compliance with the laws under which initiated."

In *Emil Krushnic,* 52 L.D. 282 (1927), the Department held that failure to perform annual assessment work was a failure to maintain a claim under the law and automatically subjected the claim to cancellation by the Government. The Supreme Court rejected this theory in *Wilbur* v. *Krushnic,* 280 U.S. 306 (1930), and held that a failure to do assessment work could not be challenged by the Government *following the resumption of work on the claim.*

Following *Wilbur* v. *Krushnic, supra,* the Department took the position that the United States could make a lawful challenge to the validity of an oil shale claim for failure to perform annual assessment labor if such challenge was made *before assessment work was resumed* on the claim.[4] Accordingly, the Land

[3] As required by the Mining Law of May 10, 1872 (Rev. Stat., secs. 2324, 2325; 30 U.S.C., secs. 28, 29).

[4] *Instructions,* 53 I.D. 131 (1930).

Commissioner ordered that new adverse proceedings be commenced on each claim on which there was an actual default and no resumption of the annual labor required by the statute.

However, in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* the Supreme Court declined to accept the Department's theory that oil shale claims could be canceled where assessment work was delinquent and had not been resumed. The Court said that the decision of the Department in canceling these claims "* * * went beyond the authority conferred by law." 295 U.S. at 647.

Shortly thereafter, the Department issued its decision in *The Shale Oil Company,* 55 I.D. 287 (1935), which recalled and vacated the departmental decision in *Virginia-Colorado Development Corporation,* 53 I.D. 666 (1932), and held that all other departmental decisions and instructions which were inconsistent with the decision of the Supreme Court were "overruled." The early decisions canceling the claims now being considered were never reopened, recalled or vacated in proceedings following *The Shale Oil Company, supra.*[5]

[5] With one exception, no appeals were taken from the decisions of the Land Commissioner which canceled the claims in issue here. In one case, the cancellation of the Oyler Nos. 1–4 oil shale placer claims was appealed to the Secretary of the Interior. The cancellation was upheld by the Secretary (*The Index Shale Oil Company,* A–16465 (Mar. 10, 1932)), and the final Departmental decision was not challenged by subsequent court action. The Oyler Nos. 1–4 claims form the basis for an application filed by Pacific Oil Company which was rejected by the Manager in February 1962, and which is included among the rejections on appeal herein.

PROCEDURAL REQUIREMENTS OF DEPARTMENTAL REGULATIONS, THE ADMINISTRATIVE PROCEDURE ACT, AND THE FIFTH AMENDMENT

As stated above, the appellants have joined in a motion to vacate the Land Manager's decisions and/or to remand the case for full hearing on issues of fact and law. The motion is based, in part, on the assertion that the Manager was required to refer the matter to a hearing examiner for a full hearing and that his failure to do so is tantamount to an attempt to invalidate the claims without a hearing of any kind. However, hearings were in fact held in the contest proceedings involving many of the claims included in this appeal [6] and the then-owners of those claims participated in the hearings and preserved their right of appeal.[7] The reapplication for a patent by a claimant after his claim has been contested successfully or after

[6] The following claims were canceled in contest proceedings in which the owners of the claims participated:

Carbon Nos. 1–4 (Colo. No. 030979), canceled in Contest No. 12029

Elizabeth Nos. 1, 2 and 4–12 (Colo. No. 030979), canceled in Contest No. 12029

Southeast (Colo. No. 028751), canceled in Contest No. 12972

Northeast (Colo. No. 028751), canceled in Contest No. 12972

Northwest (Colo. No. 028751), canceled in Contest No. 12972

Oyler 1–4 (Colo. No. 12327), canceled in Contest No. 12039

Jack Pot Nos. 4–11 (Colo. No. 045092), canceled in Contest No. 13038

[7] The applicable Rules of Practices provided as follows: No person who has failed to answer the contest affidavit, or having answered, has failed to appeal at the hearing, shall be allowed to appeal from the final action or decision of the Manager * * * 43 C.F.R., sec. 221.49, 19 F.R. 9056 (1954).

his patent application has been denied does not require the Department to grant a new hearing. (*Gabbs Exploration Co.*, 67 I.D. 160 (1960).) The assertion that a *de novo* hearing is now required is without merit where such cancellations were made in default proceedings in the manner prescribed by applicable departmental regulations,[8] the owners having been properly served with notice of contest and provided an opportunity to challenge the cancellation of the claim. This same contention was raised and rejected by the Department in *Gabbs Exploration Co., supra.* The latter case was upheld on review by the United States District Court for the District of Columbia and affirmed on appeal to the United States Court of Appeals for the District of Columbia Circuit.[9] The opinion by the court contains the following pertinent discussion concerning the adequacy of notice:

> The owners of the * * * claims were not denied due process in the original contests, for it is clear that they had adequate notice of the contest against them, they were offered a hearing, and they were informed of the cancellation of their claims. In view of what we have previously stated, there was no jurisdictional defect in the 1929 contests. * * * 315 F. 2d at 39–40.

As recognized in the *Gabbs Exploration Co.* decision, *supra,* the essential elements of due process are notice and an opportunity to defend against the charges asserted. (*Simon* v. *Craft,* 182 U.S. 427

[8] Circular No. 460, entitled "Manner of Proceeding in Contests Initiated Upon a Report by a Representative of the General Land Office," is reproduced in full and attached hereto as Appendix B. Sections 4, 5 and 6 thereof set forth the form and manner of issuing the notice of contest to the claimant in this class of cases. This Circular was effective at all times relevant here.

[9] *Gabbs Exploration Co.* v. *Udall*, 315 F. 2d 37 (1963).

(1901); *Cameron* v. *United States*, 252 U.S. 450 (1920)). The failure of the owners of these claims to participate in the contest proceedings of which they had adequate notice and in which they had an opportunity to defend the validity of the claims at a hearing does not entitle such owners or their successors in interest to another opportunity for a hearing on the same question. The fact that an opportunity for a hearing was forfeited by the default of the owners of these claims does not furnish the basis for a claim that due process of law has been denied. (See *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 169 (1932); *Opp Cotton Mills Inc.* v. *Administrator of the Wage and Hour Division of the Department of Labor*, 312 U.S. 126, 152 (1941)).

Appellants' assertion that failure to order a new hearing deprived them of due process is, therefore, rejected insofar as notice of contest is found to have been adequate in the original contest proceedings.

In those cases in which the requirements of notice were definitely met prior to the cancellation of the claim, the then owners of the claim having participated in the contest proceedings, the order affirming the decision of the Land Manager will, for reasons set out herein, become effective immediately.

In the remaining cases, the appellants will be granted 60 days within which to submit materials relating solely to their contention that their claims were canceled without compliance with the requirements of notice. Thereupon, a determination regarding the sufficiency of notice will be made. If necessary, hearings will be ordered to resolve any factual questions which remain unresolved on the record. If no such materials are received from these appellants within the 60-day period, they will be considered to have conceded that the Departmental records accu-

rately reflect the facts regarding the issuance of notice in the early contest proceedings and the determination will be made on the basis of the present record.

EFFECT OF THE SHALE OIL COMPANY CASE

Upon the authority of the decision of the Supreme Court in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* the decision of the Commissioner declaring oil shale placer claims forfeited in *The Shale Oil Company, supra,* was reversed by the Department.[10] It was stated in the Department's decision that:

> * * * The above-mentioned decision of the Department in the *Virginia-Colorado Development Corporation* case and in the instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of *Francis D. Weaver and Federal Oil Shale Company* and other Departmental decisions in conflict with this decision are hereby overruled. The Commissioner's decision is *reversed* and the record in the case *remanded* with instructions to reinstate the application and entry *in toto* and dispose of the same unaffected by the default in the performance of assessment labor, and if all else is found regular, to clear list the application for patent. (Italics supplied.) 55 I.D. at 290.

The appellants contend that, by overruling all departmental decisions in conflict with *The Shale Oil Company, supra,* the Secretary exercised his supervisory authority to nullify all conflicting decisions of the Land Commissioner including those involved in the present appeal. In other words, it is argued that

[10] *The Shale Oil Company*, 55 I.D. 287 (1935). *The Shale Oil Company* decision had been held up to await the *Ickes* v. *Virginia-Colorado Development Corporation* decision then pending in the Supreme Court.

while the earlier decisions purported to cancel appellants' claims, *The Shale Oil Company, supra,* reinstated or corrected them in accordance with the decision of the Supreme Court in *Ickes* v. *Virginia-Colorado Development Corporation.* We do not agree. This is not what the decision either said or accomplished.

The language in *The Shale Oil Company* case distinguishes those cases actually before the Secretary from those which were not. As to the former, the Commissioner's decisions canceling the claims were expressly *recalled* and *vacated.* The latter were merely "overruled." [11]

The Department of the Interior has often "overruled" former holdings without in any way nullifying the action taken thereunder.[12] To nullify action previously taken by giving retroactive effect to a change in administrative practice or legal ruling does vio-

[11] See *e.g., Francis D. Weaver,* 53 I.D. 175 (1930) and *The Federal Shale Oil Company,* 53 I.D. 213 (1930), both of which were cited in *The Shale Oil Company* and merely "overruled." They have been treated as simply "overruled" ever since. See the cumulative *Table of Modified and Overruled Cases* in the frontispiece of Interior Department Decisions.

[12] See *Instructions,* 35 L.D. 549 (1907). And see *Franco Western Oil Company,* 65 I.D. 427 (1958); *Anna R. Paul,* A-24350 (1947) (upheld by the District Court for the District of Columbia in *Anna R. Paul* v. *Marion Clauson,* Civil No. 3309-48 (unreported)); Solicitor's Op., 58 I.D. 319 (1943); *Timothy Sullivan, Guardian of Juanita Elsenpeter,* 46 L.D. 110 (1917), overruling *Heirs of Susan A. Davis,* 40 L.D. 573 (1912); *Bertha M. Birkland,* 45 L.D. 104 (1916); *Lillie E. Stirling,* 39 L.D. 346 (1910). The rule of prospective operation of administrative rulings has been followed by other Governmental agencies. See generally, *Davis, Administrative Law Treatise,* secs. 5.09 and 17.07.

lence to the settled principle of finality of administrative action. In this regard, the following statement set forth in *Franco Western Oil Company,* 65 I.D. 427 (1958), adequately summarizes the Department's long-standing practice:

> * * * the rule applied by the Department on those occasions when it has specifically considered the question as to whether, because of change in the interpretation of a statute, its holding should have retroactive effect, has been to deny such effect to its decisions. 65 I.D. at 429.

In *Safarik* v. *Udall,* 304 F. 2d 944 (D.C. Cir. 1962), the Court of Appeals for the District of Columbia Circuit upheld the long-standing practice of the Department of the Interior to give prospective application to its decisions. The Court therein stated:

> * * * the Secretary of the Interior * * * should have and does have authority, when he promulgates an interpretive regulation, *or hands down a decision placing a different construction on a statute or regulation, from that laid down in an earlier decision or regulation, to give prospective operation only to the later regulation or decision.* (Italics supplied.) 304 F. 2d at 950.

It is therefore concluded that the departmental decision in *The Shale Oil Company, supra,* merely recalled and vacated the earlier decision in that particular case "* * * thereby depriving the earlier opinion of all authority as as [sic] precedent."[13] It is further concluded that the decision in *The Shale Oil Company, supra,* had no effect on the cases presently before us in this appeal.

---

[13] Black, Law Dictionary (4th ed. 1951).

APPLICATION OF THE DOCTRINE OF FINALITY OF ADMINISTRATIVE ACTION

The contention made by appellants that the doctrine of *res judicata* has no application to decisions of administrative agencies is erroneous.[14] The contention that the doctrine of *res judicata* (or its administrative-law counterpart—the doctrine of finality of administrative action) has not been recognized and applied before the Department of the Interior is similarly unsupportable. Since 1883 [15] the Department has consistently held that the doctrine of *res judicata* is applicable to departmental decisions.[16] In 1886, Secretary Lamar stated, in *Rancho San Rafael De La Zanja*, 4 L.D. 482, that:

> * * * Unless the principle of *res judicata* is recognized administrative action may become involved in chaos; the labors of the Department would become too cumbrous to admit of their intelligent discharge; uncertainty would cloud every inchoate title and, in many instances, vested rights would be endangered. 4 L.D. at 482.

In addition to the numerous departmental decisions recognizing the doctrine of administrative action, it

---

[14] See generally, 50 C.J.S. *Judgments-Public Officers and Boards*, sec. 606; 2 *Davis, Administrative Law Treatise*, sec. 18.10 and authority cited therein.

[15] See *Meredith* v. *The Atlantic and Pacific Railroad Company*, 2 L.D. 499 (1883).

[16] See, e.g., *Edward Christman*, 62 I.D. 127 (1955); *H. W. Rowley*, 58 I.D. 550 (1943); *Henshaw* v. *Ellmaker*, 56 I.D. 241 (1937); *Charles Perkins*, 50 L.D. 172 (1923); *Lillie M. Kelly*, 49 L.D. 659 (1923); *Fosdick* v. *Shackleford*, 47 L.D. 558 (1920); *Lacey* v. *Grondorf*, 38 L.D. 553 (1910); *Gammon* v. *Weaver*, 26 L.D. 383 (1898); *Mee* v. *Hughart*, 23 L.D. 455 (1896); *Mary C. Stephenson*, 11 L.D. 232 (1890); *A. T. Lamphere*, 8 L.D. 134 (1889); *Higgins* v. *Wells*, 3 L.D. 21 (1884).

has been implemented in the rules of practice before the Department.[17]

The doctrine of *res judicata,* as applied in administrative decisions by this Department, is designed to achieve orderliness in the administration of the public lands as well as finality of decisions which have been closed finally and have not been appealed or otherwise attacked. Every reason of policy which supports the doctrine in the courts is applicable here. There must be an end to administrative litigation also. Public rights as well as private cannot be indefinitely suspended because further litigation may someday be initiated.

In applying the doctrine here, we are aware of the principle, urged so strongly by the appellants, that since the Secretary has a continuing jurisdiction with respect to public lands until a patent issues, he is not estopped by the principles of *res judicata* and finality of administrative action, from correcting or reversing an erroneous decision by his subordinates or his predecessor in office. However, where, as here, the claim has been declared null and void in regular proceedings and the mining claimant acquiesces in such decision for many years, the decision nullifying the claim will be treated as conclusive and will not be reopened in the absence of a legal or equitable

[17] Prior to revision in 1956, 43 C.F.R. sec. 221, provided as follows: No appeal shall be had from action of Director affirming the decision of the manager in any case where the party adversely affected shall have failed to appeal from the decision of said manager. 43 C.F.R. sec. 221.74.

The pertinent portion of the revised regulations provides: *Effect of Failure to Appeal.* When any party fails to appeal from an adverse decision of the Directors that decision shall as to such party be final and will not be disturbed except for fraud or for gross irregularity. 43 C.F.R. sec. 221.10, as revised in Circular 1950, 21 F.R. 1860, March 27, 1956.

basis warranting reconsideration. (*Gabbs Exploration Co.*, 67 I.D. 160 (1960); *Gabbs Exploration Co.*, A–28213 (May 24, 1960) and A–28213 (Supp.) (July 11, 1960); *Garfield County Exploration Co.*, A–28351 (August 30, 1960); *Langdon H. Larwill*, A–28697 (May 16, 1963). Nor does the fact that the legal basis for the decision has later been held by the court of appeals or the Supreme Court to be erroneous require a reconsideration and reversal of cases finally decided before the change in the interpretation or application of the law. (See *e.g.*, *Edward Christman*, 62 I.D. 127 (1955); *Lillie M. Kelly*, 49 L.D. 659 (1923); and *Mee* v. *Hughart*, 23 L.D. 455 (1896)).

In *Lillie M. Kelly, supra*, the Department of the Interior had canceled homestead entries after the issuance of the receiver's receipt. Kelly did not appeal from the decision and acquiesced therein for five years or more. In similar proceedings in another case (*Thomas J. Stockley*, 44 L.D. 178 (1915)), the decision of the Secretary was challenged in a suit in equity and appealed eventually to the Supreme Court. The Court, in *Stockley* v. *United States*, 260 U.S. 532 (1923), held that:

> The action of the Commissioner of the General Land Office, therefore, in directing a contest against Stockley's entry three years after the issuance to him of the receiver's receipt, *was unauthorized and void.* (Italics supplied.) 260 U.S. at 544.

Following the Supreme Court's decision in the *Stockley* case, Mrs. Kelly applied for an unrestricted patent claiming the earlier contest against her entry was "unauthorized and void." The Department's decision contains the following pertinent statement:

> * * * The Department has held that a decision made in accordance with the practice prevailing at the time it was rendered, if accepted

> by the parties affected as final, will not be reopened for the reason that the practice then prevailing *has subsequently been held erroneous by the Supreme Court.* (Italics supplied.) 49 L.D. at 662.

The principle upon which the Department relied in canceling numerous oil shale placer claims was declared by the Supreme Court to be erroneous and beyond the authority conferred by applicable statutes. *Ickes* v. *Virginia-Colorado Development Corporation, supra.* The early decisions in the cases presently before the Secretary were not appealed and the Department has not vacated them. They were acquiesced in by those adversely affected for over 25 years. "The fact that * * *" the principle on which these earlier decisions are based is "* * * now held by the Supreme Court to be erroneous is not deemed a sufficient reason for reversing and annulling decisions which have become final." *Mee* v. *Hughart, supra.*

JURISDICTION OF THE LAND COMMISSIONER AND EFFECT OF ICKES V. VIRGINIA-COLORADO DEVELOPMENT CORPORATION

The appellants contend that the Supreme Court, in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* held that the Department of the Interior was without jurisdiction to cancel claims for failure to do assessment work. Of course, no adjudication can be said to be *res judicata* if it was rendered by a tribunal not having jurisdiction.[18] But the Court did

[18] Compare, *Best* v. *Polk*, 85 U.S. (18 Wall.) 112 (1873), with, *Minter* v. *Crommelin*, 59 U.S. (18 How.) 87 (1855). And compare, *Doolan* v. *Carr*, 125 U.S. 618 (1887), with, *Quinby* v. *Conlan*, 104 U.S. 420 (1882). And see, *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902).

not hold that the Department lacked jurisdiction. To the contrary, it was held that:

> There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that is was subject to cancellation by reason of abandonment.[19] 295 U.S. at 645.

And on the question of the Secretary's authority to cancel for failure to perform assessment work, the Court stated:

> We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law. 295 U.S. at 647.

It is on the basis of this language that appellants contend that the Secretary was without jurisdiction to challenge these claims. A close examination of that language, the history of the litigation and related decisions require the rejection of appellants' contention.

Earlier, in *Wilbur* v. *Krushnic,* 280 U.S. 306 (1930), the Court had concluded that the Department could not cancel claims upon the ground of failure to do assessment work following the resumption of work. The Court did not deny the Secretary's jurisdiction. In fact, it affirmed his full authority to consider the case but found that he had "* * * interpreted and applied a statute in a way contrary to its explicit terms * * *."[20] In explaining the effect of the Sec-

[19] Citing *Cameron* v. *United States*, 252 U.S. 450, 460 (1920); *Cole* v. *Ralph*, 252 U.S. 286 (1920); *Black* v. *Elkhorn Mining Co.*, 163 U.S. 445, 450 (1896); *Brown* v. *Gurney*, 201 U.S. 184, 192, 193 (1906); *Farrell* v. *Lockhart*, 210 U.S. 142, 147 (1908).

[20] 280 U.S. at 319.

retary's error in construing the statute,[21] *Roberts* v. *United States,* 176 U.S. 221 (1900), was quoted as follows:

> * * * Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. * * * 176 U.S. at 231.[22]

A clear analogy exists in the principles applicable to the public lands. *Cameron* v. *United States,* 252 U.S. 450 (1920). In the *Cameron* case the Court stated:

> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the Department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. 252 U.S. at 459–60.[23]

---

[21] The Mineral Leasing Act of 1920, 41 Stat. 451, 30 U.S.C., sec. 193.

[22] See also, *United States ex rel. Ness* v. *Fisher,* 223 U.S. 683 (1912); and *Decatur* v. *Pauling,* 39 U.S. (14 Pet.) 497 (1840).

[23] Citing Rev. Stat., secs. 441, 453, 2476; *United States* v. *Schurz,* 102 U.S. 378, 395 (1880); *Lee* v. *Johnson,* 116 U.S. 48, 52 (1885); *Knight* v. *United States Land Ass'n.* 142 U.S. 161, 177, 181 (1891); *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316 (1903). The nature and extent of the Department's jurisdiction over the disposition of public lands, and particularly under the mining laws, was more recently discussed in *Duguid* v. *Best,* 291 F. 2d 235 (9th Cir. 1961), in the following terms:

It is undisputed that the Congress has granted to the Secre-

And further:

> True, The Mineral Land Law does not itself confer such authority on the land department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the land department. 252 U.S. at 461.[24]

These principles were most recently reiterated by the Supreme Court in *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 337 (1963).

In *United States* v. *Winona & St. P.R. Co.*, 67 Fed. 848 (8th Cir. 1895), aff'd., 165 U.S. 463 (1897), the Court of Appeals set forth the following test for determining whether the Land Department has jurisdiction over the subject matter with which it purports to deal:

> * * * Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and determine whether or not they are sufficient to invoke the exercise of that power. *The test of jurisdiction is whether the tribunal has power to enter upon*

---

tary of the Interior general supervisory authority over public business relating to public lands, including mines.

"* * * there can be no question as to the power and authority of the Secretary of the Interior, under the grant of authority to supervise public business on public lands, including mines, to initiate through the subordinate Bureau of Land Management a contest in order to see "that valid claims on public land may be recognized, invalid ones eliminated, and the rights of the public preserved." 291 F. 2d at 241.

[24] See also *Cole* v. *Ralph*, *supra*, fn. 19; *Farrell* v. *Lockhart*, *supra*, fn. 19; *Brown* v. *Gurney*, *supra*, fn. 19; and *Black* v. *Elkhorn Mining Co.*, *supra*, fn. 19. And see generally, *Standard Oil Co. of California* v. *United States*, 107 F. 2d 402 (9th Cir. 1940).

the injuiry, not whether its conclusion in the course of it is right or wrong.[25] (Italics supplied.) 67 Fed. 959–60.

Having concluded that the Secretary or the Land Commissioner had jurisdiction over the subject matter of the claims presently in dispute, and that they had the necessary authority to enter upon the inquiry as to the validity of the claim, we have only to determine the ultimate effect of an error of law committed by these officials in the exercise of this authority. In this regard, we do not question that the appellants or their predecessors in interest could have invoked judicial review of the Department's decisions under applicable precedent,[26] even though the time within which

---

[25] See also, *United States* v. *Northern Pac. R. Co.*, 95 Fed. 864 (8th Cir. 1899), aff'd., 177 U.S. 435 (1900); and *Foltz* v. *St. Louis & S.R. Ry. Co.*, 60 Fed. 316 (8th Cir. 1894). And see *King* v. *McAndrews*, 111 Fed. 860 (8th Cir. 1901), wherein the court stated the principle as follows:

"The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. [Citations] Hence a patent evidencing an erroneous decision of a question of law or a mistaken determination of an issue of fact, which the department was vested with the power, and charged with the duty, to decide, is as impervious to collateral attack as one which is the result of correct conclusions." 111 Fed. at 864.

[26] See e.g., *El Paso Brick Co.* v. *McKnight*, 233 U.S. 250 (1914), wherein the court held that an order erroneously issued by the Department refusing a patent for a mining claim could not deprive the claimant of vested rights "* * * [f]or while the General Land Office had power of supervision over the acts of the local officers, and could annul entries obtained by fraud or made without authority of law, yet *if the Department's cancellation was based upon a mistake of law, its ruling was subject to judicial review when properly drawn in question in judicial proceedings*, inasmuch as the power of the land office is not unlimited, nor can it be arbitrarily exercised so as to deprive any person of land lawfully entered and paid for." 233 U.S. at 257–58. (Italics supplied.)

the claimants could have appealed to the Secretary had expired. The claimants, following the decision in *Ickes* v. *Virginia-Colorado Development Corporation*, *supra*, had at least two alternatives open to them to protect their claims. They could have petitioned the Secretary to exercise his supervisory authority to recall and vacate the Land Commissioner's cancellation of the claim as he had done in *The Shale Oil Company, supra*, or they could have sought relief in the courts in proper proceedings instituted for that purpose.[27] The claimants did neither.

Since the judicial relief which was available to the claimants was equitable in nature, it was incumbent upon them to seek judicial relief within a reasonable time after the Supreme Court, in the *Virginia-Colorado Development Corporation* case, had determined that the cancellations by the Department were erro-

---

[27] See e.g., *Sanford* v. *Sanford*, 139 U.S. 642 (1891); *Shepley* v. *Cowan*, 91 U.S. 330 (1875); *Silver* v. *Ladd*, 74 U.S. (7 Wall.) 219 (1868).

In *Sanford* v. *Sanford*, *supra*, the court said:

"* * * where the matters determined are not properly before the department, or its conclusions have been reached from a misconstruction, by its officers, of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, *then the courts, can in a proper proceeding*, interfere and control its determination so as to secure the just rights of parties injuriously affected." (139 U.S. at 647.) (Italics supplied.)

See also, *Moffat* v. *United States*, 112 U.S. 24 (1884); *Bernier* v. *Bernier*, 147 U.S. 242 (1893); *Moore* v. *Robbins*, 96 U.S. 538 (1877); *Johnson* v. *Towsley*, 80 U.S. (13 Wall.) 72 (1871); *Lindsey* v. *Hawes*, 67 U.S. (2 Black) 554 (1862); *Lytle* v. *Arkansas*, 63 U.S. (22 How.) 193 (1859); *Garland* v. *Wynn*, 61 U.S. (20 How.) 6 (1857); *Barnard's Heirs* v. *Ashley's Heirs*, 59 U.S. (18 How.) 43 (1855); *Cunningham* v. *Ashley*, 55 U.S. (14 How.) 377 (1852).

neous. Otherwise, the claimants' judicial remedy would be subject to the equitable defenses of estoppel and laches unless it were clearly shown that the decision of the Department was void *ab initio*.

When, as here, the administrative officer has acted within his jurisdiction and a judicial review of such action has not been sought on a timely basis, the principles of estoppel, laches and *res judicata* are merged in the doctrine of finality of administrative action and are operative to bar appellants' claim for relief. This conclusion is in accord with the principles set forth in the several recent cases discussed above, all of which involved oil shale placer claims.[28] The following language, used by the court in *Gabbs Exploration Co.* v. *Udall, supra,* in rejecting similar claims, is particularly pertinent here:

> Here neither plaintiff nor its predecessors in interest took timely action to have the wrong righted, and plaintiff cannot complain of the Secretary's failure to reopen the case. It is significant also that in all the cases cited to us in which a prior decision was reopened the longest period elapsing before reconsideration was three years. Here twenty-seven years have elapsed between the alleged wrong (1929) and plaintiffs attempt to have it corrected (1956). There might be some reason to impel the Secretary to reopen a prior decision in order to purge an incorrect determination, but the passage of time might prevent or greatly hinder a proper determination of the initial question, in which case it would be inappropriate for him

[28] See *Langdon H. Larwill*, A–28697 (May 16, 1963); *Gabbs Exploration Co.*, 67 I.D. 160 (1960); aff'd. *Gabbs Exploration Co.* v. *Udall*, 315 F. 2d 37 (D.C. Cir. 1960); *Garfield County Exploration Co.*, A–28351 (August 30, 1960); *J. C. Nelson*, 64 I.D. 103 (1957). See also, *Charles D. Edmonson*, 61 I.D. 355 (1954), and cases cited therein.

> to reopen the case even though he retains jurisdiction over the land in dispute * * * 315 F. 2d at 41."[20]

It is evident that the Secretary or the Land Commissioner, in the *Krushnic* case, in the *Virginia-Colorado Development Corporation* case, and in the cases before us in this appeal, had the duty, the responsibility and, necessarily then, the jurisdiction to construe the statute. The construction placed upon the statute was appealed in *Krushnic* and in *Virginia-Colorado Development Corporation,* and the contention of the appellant that the Secretary erred was upheld. However, in the cases before us, appellants cannot complain after nearly 30 years of silence, inaction, and acquiescence. Neither they nor their "* * * predecessors in interest took timely action to have the wrong righted * * *." *Gabbs Exploration Co.* v. *Udall,* 315 F. 2d at 41.

PAST ADMINISTRATIVE PRACTICE

Finally, the appellants contend that, following the decision in *Ickes* v. *Virginia-Colorado Development Corporation, supra,* and until the Manager's decision in February, 1962, rejecting their applications, the United States has consistently recognized the validity of the subject mining claims. They contend that there has been a long-standing, continuous and consistent

---

[20] The court also observed that:

The Department of the Interior, which has recognized the right of the Secretary to reconsider certain prior decisions, has also recognized that there must be some time limit on such reconsideration. As Assistant Attorney General Van Devanter said in *Aspen Consolidated Mining Co.* v. *Williams,* 27 L.D. 1, at 11:

"The parties remain the same and the one complaining of the former decision has taken timely and decisive action to have the alleged wrong corrected." 315 F. 2d at 40–41.

administrative interpretation and application of the *Virginia-Colorado Development* case beginning with the Department's decision in *The Shale Oil Company, supra.* In this regard, the appellants rely upon certain letters written by officers of the Land Department which expressed the view that the previous decisions of the Land Commissioner canceling oil shale placer claims were void and had no effect on the claim.[30]

The argument advanced by the appellants is not based on the facts. While some officials of the Department may have expressed the view that the original cancellations were void and of no effect, at the same time, action was taken with respect to the subject land which was entirely inconsistent with the recognition of valid and subsisting claims.

On April 15, 1930, pursuant to Executive Order No. 5327, all oil shale deposits owned by the United States were withdrawn, subject to valid existing

[30] The following documents were submitted by the appellants as evidence of the Department's position:

1. Letter of July 29, 1935, from the Commissioner of the General Land Office to the Register, Denver, Colorado (attached as Appendix C–1).

2. Letter of April 22, 1936, from Ida Dere, Grand Valley, Colorado (then owner of the Lucy Agnes Nos. 1–2 oil shale placer claims), to the Commissioner, General Land Office (attached as Appendix C–2).

3. Letter of May 4, 1936, from the Commissioner, General Land Office, to Ida Dere, Grand Valley, Colorado (attached as Appendix C–3).

4. Letter of July 4, 1944, from the Commissioner, General Land Office, to Mr. W. Porter Nelson, Denver, Colorado (attached as Appendix C–4).

5. Letter from the Commissioner, General Land Office, to Mr. Edward Altenbern, DeBeque, Colorado (attached as Appendix C–5).

6. Letter of October 31, 1935, from the Acting Secretary of the Interior to the Secretary of the Navy (attached as Appendix C–6).

352-158—69——7

rights, from lease or other disposal, except for application for patent under the mining laws for metalliferous mining claims or application based on claims initiated prior to the date of the withdrawal. The withdrawn lands were reserved for purposes of investigation, examination and classification. See *Instructions,* Circular No. 1220, 53 I.D. 127 (1930). Among the lands included in the withdrawal are those here under consideration as indicated in the instructions dated April 22, 1931, from the Commissioner of the General Land Office to the Register, Denver, Colorado, which listed among the subdivisions in Colorado covered by Executive Order No. 5327 all of secs. 7 to 36, T. 4 S., R. 99 W., 6th P.M.

Executive Order No. 5327, above-mentioned, attached to the lands here under consideration as a secondary claim and operated to withdraw them from the public domain when the determination that the mining claims were null and void for failure to do assessment work became final, since, on the termination of the mining locations, possessory title to the lands reverted to the United States. See *Cameron* v. *United States,* 252 U.S. 450 (1920); *Gabbs Exploration Company,* 67 I.D. 160, 169 (1960); and Solicitor's Opinion, 55 I.D. 205, 208 (1935). And see, *Vanadium Corporation of America, et al.,* A–26914 (September 8, 1954). As a result of the decisions of the Land Commissioner in 1930 and 1931 declaring these claims null and void for failure to do assessment work, Executive Order No. 5327 was operative to exclude all subsequent entries thereon, except as permitted by the order.

On February 6, 1933, Executive Order No. 6016 authorized the issuance of oil and gas leases under the Mineral Leasing Act on lands withdrawn by Executive Order No. 5327.

Pursuant to the later Executive Order, the Department has issued numerous oil and gas leases and the rights of the third party lessees have intervened. Some of the oil and gas leases are still outstanding and proceedings have been instituted under the Multiple Mineral Development Act (Act of August 13, 1954, as amended (30 U.S.C., sec. 527)), to determine the rights as between oil shale placer claimants and lessees under oil and gas leases issued by the United States. Such proceedings have been suspended pending the outcome of the subject appeals.

The important point here is that, on many of the tracts in question, the United States, acting largely by and through this Department, has, for some 25 years since the cancellation of the oil shale placer claims, exercised exclusive control over the land and has permitted third parties to acquire rights therein. In view of these facts, the assertion on appeal that the United States or the Secretary of the Interior has recognized the validity of these mining claims and has not taken action which is inconsistent therewith, is without support.

But even assuming, *arguendo,* that a long-standing continuous and consistent departmental recognition of these claims is shown, such a showing would not entitle the appellants to patents on these claims. For reasons heretofore stated, the validity of these claims was not established by the decision of the Department in *The Shale Oil Company* case, *supra,* nor by any subsequent administrative or judicial action, and any administrative practice to the contrary would have been clearly erroneous. Administrative practice, however long-standing and consistent, is not controlling when it is clearly erroneous. *County of Marin* v. *United States,* 356 U.S. 412 (1958); *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946);

Burnet v. *Chicago Portrait Co.*, 285 U.S. 1 (1932); *Webster* v. *Luther*, 163 U.S. 331 (1896); *Merritt* v. *Cameron*, 137 U.S. 542 (1890); *United States* v. *Graham*, 110 U.S. 219 (1884); *Swift Company* v. *United States*, 105 U.S. 691 (1881). And see Solicitor's Opinion, 68 I.D. 372 (1961), and cases cited herein.

Furthermore, the application of doctrine of administrative practice or construction is "* * * restricted to cases in which the construction involved is really one of doubt *and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance.*" *Studebaker* v. *Perry*, 184 U.S. 258, 269 (1902).[31] [Italics supplied.] Here the appellants have attempted to demonstrate the existence of a long-continued practice by this Department in recognizing the validity of their claims. In support thereof, they have submitted the documentation abovementioned.[32] Yet there is no clear showing that any of the appellants knew of or relied upon any of these documents at the time they acquired an interest in their claims. Indeed, it appears that the existence of such documents became known to the appellants only after their claims were challenged and their patent applications rejected by the Land Manager in 1962. Under these circumstances, no rights have accrued to the appellants by reason of the alleged departmental practice.

SUMMARY

In summary, we have found (1) that the Secretary and his duly authorized agent, the Land Commissioner, had jurisdiction to enter upon inquiry as to the validity of oil shale placer claims under the applicable statutes; (2) that they had the jurisdiction

[31] See generally, Annot., 73 L. Ed. 322 (1928), and, Annot., 84 L. Ed. 28 (1939).

[32] See footnote 30, *supra*.

to construe such statutes in defining their authority; (3) that in the exercise of this function they may have erred in canceling claims including some of the claims upon which the patent applications in the present case are based; (4) that these cancellations were not appealed from by the appellants or their predecessors in interest; (5) that neither the appellants nor their predecessors in interest sought to attack these decisions for over 25 years. We conclude that, on the principles of *res judicata,* finality of administrative action, and laches, the said decisions of the Land Commissioner and the Secretary of the Interior are binding on the parties thereto and their successors in interest insofar as these claims were actually canceled in the original contest proceedings in which the then-owners of the claims were properly served with notice of contest and provided an opportunity for a hearing respecting the validity of the claim.

As heretofore mentioned, the following claims were canceled in contest proceedings in which the then-owners of the claims participated, thus eliminating any question concerning the sufficiency of or defects in the issuance of notice:

Claim	Patent application	Contest
Carbon Nos. 1-4	Colo. No. 030979	No. 12029
Elizabeth Nos. 1, 2, 4-12	Colo. No. 030979	No. 12029
Southeast	Colo. No. 028751	No. 12972
Northeast	Colo. No. 028751	No. 12972
Northwest	Colo. No. 028751	No. 12972
Oyler Nos. 1-4	Colo. No. 012327	No. 12059
Jack Pot Nos. 4-11	Colo. No. 045002	Nos 13038

As to these claims, the decisions of the Land Manager rejecting applications for patents are hereby affirmed.

As to all other claims involved in this appeal, the final order affirming or reversing the decision of the Land Manager will be held in abeyance pending a determination of the sufficiency of notice of contest in the contest proceedings in which the claims were canceled. The appellants holding such claims who wish to pursue the contention that their claims were canceled without compliance with the requirements of notice, are hereby granted 60 days within which to submit materials relating solely to such contention. Thereupon, a determination regarding the sufficiency of notice will be made and a final order entered on the appeal. If necessary, hearings will be ordered to resolve any factual questions which remain unresolved on the record. Appellants who do not submit such materials shall be considered to have conceded that the departmental records accurately reflect the facts regarding the issuance of notice in the contest proceedings and the determination will be made on the basis of the present record.

This decision is rendered and the action herein set forth is taken pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348).

FRANK J. BARRY,
Solicitor.

APPENDIX A

Appeal No.	Appellant	Colorado Serial No.	Manager's decision
A-2660	Union Oil Co. of California	07667	Feb. 16, 1962
		09072	Feb. 16, 1962
	Pacific Oil Company	012327	Feb. 16, 1962
	Weber Oil Company	014671	Feb. 16, 1962
	Tell Ertl	016334	Feb. 16, 1962
	Tell Ertl	016671	Feb. 16, 1962
	Henry L. Price		
	Silmon Smith		
	Charles Holmes		
	Gabbs Exploration Company	018673	Feb. 23, 1962
	Dwight S. Young	022459	Feb. 16, 1962
	John W. Savage	022460	Feb. 16, 1962
	Charles H. Prien	022461	Feb. 16, 1962
	Barnette T. Napier	028751	Feb. 16, 1962
	Grace A. Savage		
	Maude B. Farnum		
	John W. Savage		
	John R. Farnum, Jr		
	St. Clair Napier Catlin		
	William H. Farnum, Jr		
	Joan L. Savage		
	Neil S. Mincer		
	Energy Resources Technology Land, Inc	029427	Feb. 16, 1962
		029428	Feb. 16, 1962
		031342	Feb. 16, 1962
	Wasatch Development Company		
	Joseph B. Umbleby	030979	Feb. 16, 1962
	John W. Savage	034270	Feb. 16, 1962
		034271	Feb. 16, 1962
	Harlan H. Hugg	045002	Feb. 16, 1962
	Dorothy D. Hugg		

APPENDIX B

[Circular No. 460]

Manner of Proceeding in Contests Initiated Upon a Report by a Representative of the General Land Office

Washington, D.C., *February 26, 1916.*

To Special Agents, and Registers and Receivers, United States Land Offices:

The following rules are prescribed for proceedings in contests initiated upon a report by a representative of the General Land Office. All existing instructions in conflict herewith are superseded:

1. The purpose hereof is to secure speedy action upon claims to the public lands, and to allow claimant, entryman, or other claimant of record, opportunity to file a denial of the charges against the entry or claim, and to be heard thereon if he so desires.

2. Upon receipt of a report this office will consider the same and determine therefrom whether the facts stated, if true, would warrant the rejection or cancellation of the entry or claim.

3. Should the charges, if not disputed, justify the rejection or cancellation of the entry or claim the local officers will be duly notified thereof and directed to issue notice of such charges in the manner and form hereinafter provided for, which notice must be served upon the entrymen and other parties in interest shown to be entitled to notice.

4. The notice must be written or printed and must refer to the letter from this office by initial and date, as authority for issuing the notice, and must state fully the charges as contained in said letter; also the number of the entry or claim, subdivision of land involved, name of entryman or claimant or other known parties in interest.

5. The notice must also state that the charges will be accepted as true, (*a*) unless the entryman or claimant files in the local office within thirty days from receipt of notice a written denial, under oath, of said charges, with an application for a hearing, (*b*) or submits a statement of facts rendering the charges immaterial, (*c*) or if he fails to appear at any hearing that may be ordered in the case.

6. Notice of the charges may in all cases be served personally upon the proper party by any officer or person or by registered letter mailed to the last address of the party to be notified, as shown by the record, and to the post office nearest to the land. When it is necessary to serve notice on the unknown heirs of a person in interest, the same must be addressed to that person at his address of record and also at the post office nearest the land. Proof of personal service shall be the written acknowledgement of the person served or the affidavit of the person who served the notice, attached thereto, stating the time, place, and manner of service. Proof of service of notice by registered letter shall consist of the report of the register and receiver who mailed the notices, accompanied by the post office registry return receipts, or the returned unclaimed registered letters.

7. If a hearing is asked for, the local officers will consider same and confer with the Chief of Field Division relative thereto and fix a date for the hearing, due notice of which must be given entryman or claimant. The above notice may be served by registered mail. By ordinary mail, a like notice will be sent to the Chief of Field Division.

8. The Chief of Field Division will duly submit, upon the form provided therefor, to this office, an estimate of the probable expense required on behalf of the Government. He will also cause to be served subpoenas upon the Government witnesses and take such other steps as are necessary to prepare the case for prosecution.

9. The Government must appear with its witnesses on the date and at the place fixed for said hearing, unless there is reason to believe that no appearance on behalf of the Government will be required. The officer in charge of hearings must, therefore, keep advised, as far as possible, as to whether the defendant intends to appear at the hearing. The Chief of Field Division may, when present, conduct the hearing on behalf of the Government.

10. If the entryman or claimant fails to deny the charges under oath and apply for a hearing, or to submit a statement of facts rendering the charges immaterial, or fails to appear at the hearing ordered without showing good cause therefor, such failure will be taken as an admission of the truth of the charges and will obviate the necessity for the Government submitting evidence in support thereof, and the register and receiver will forthwith forward the case with recommendation thereon to the General Land Office and notify the parties by registered mail of the action taken. In cases finally closed upon default of claimant if application to reopen any case is filed with the register and receiver they will forthwith forward same with recommendations to the General Land Office.

11. Upon the day set for the hearing and the day to which it may be continued the testimony of the witnesses for either party may be submitted, and both parties, if present, may examine and cross-examine the witnesses, under the rules, the Government to assume the burden of proving the charges, unless otherwise ordered.

12. If a hearing is had, as provided in paragraph 11, the local officers will render their decision upon the record, giving due notice thereof, in the usual manner. When decision is adverse to the Government, notice thereof must be sent to the Chief of Field Division.

13. Appeals or briefs, if filed, must be in accordance with the rules, but need not be served upon the Chief of Field Division or Government representative in charge of the hearing.

14. The above proceedings will be governed by the rules of practice. All notices served on claimants or entrymen must likewise be served upon transferees or mortgagees.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

APPENDIX C-1

JULY 29, 1935.

REGISTER,
Denver, Colorado.

SIR: July 10, 1930, adverse proceedings were directed against the validity of the Liberty No. 1, Oil Shale Placer, SE., Sec. 22, T. 2 S., R. 95 W., 6th P.M. on the charge that annual assessment work was not performed on the claim for the year ending July 1, 1930, and that work has not been since resumed.

After notice issued and answer denying the charges was duly filed, hearing was duly before a United States Commissioner at Glenwood Springs, Colorado, on June 11, 1932, at which the Government appeared by attorney and no other appearances were noted. April 12, 1933, you transmitted the record to this office without decision.

On June 3, 1935, the Supreme Court decided in the case of Ickes vs. Virginia-Colorado Development Corporation, that the United States has no right to declare oil shale placers null and void because of failure on the part of the claimants to perform annual assessment work thereon, and on June 24, 1935, the Department in the case of the Shale Oil Company, Denver, mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case, and overruled its previous decisions in conflict with the Supreme Court's decision.

From the foregoing it is clear that the adverse proceedings in this case are invalid for any purpose. Accordingly, contest No. 11823 is dismissed and the case is closed. Advise the parties hereof.

Several contest cases involving oil shale placers are now pending in your office. In view of the decisions referred to hereinabove, you are instructed to close out on your records and transmit to this office all contest cases involving solely the question of a failure to perform annual assessment work, and failure to resume work on

oil shale placers prior to the date of a challenge by the United States to the valid existence of the claim, where no answer has been filed by the claimants. In all cases involving only the question of annual assessment work where answer has been filed by any of the contestees you will transmit the records to this office without action.

You will retain in your files, subject to further instructions from this office all contest cases involving oil shale placers wherein charges have been made involving other questions than that above stated, even if a charge has also been made in that regard.

In your response hereto refer to this letter by date and number.

Very respectfully,

(Sgd.) FRED W. JOHNSON,
Commissioner.

APPENDIX C–2

BOX 477, GRAND VALLEY, COLORADO,

April 22, 1936.

COMMISSIONER GENERAL LAND OFFICE,
Washington, D.C.

Please advise the undersigned, Ida Dere, why Lucy Agness Oil Shale Claims Nos. 1 and 2 (being N½, N½ and S½N½, Sec. 4, Township 5 South. R 95 West) should not be clear listed from the charge of failure to do and perform annual assessment work. Being contest No. 11750, in keeping with and per tenor of your letter dated 7/29/35, which ordered the clear listing of Liberty Oil Shale Claim No. 1, being contest No. 11823 addressed to Register of Denver Land Office. These two claims were valid existing claims on 2/25/20, with several years assessment work having since been done. The field Division Inspectors convinced me on or about the year 1927 or 28, that it would be useless to go to the expense of answering the Government contest, but the Supreme Court Decision of 6/3/35, seemingly has set at naught all of these former challenges, where the only question was lack of assessment work. Please clear list my said claims or advise me what must be done to get them clear listed.

Yours respectfully,

(Sgd.) IDA DERE.

APPENDIX C–3

MAY 4, 1936.

IDA DERE,
Box 477, Grand Valley, Colorado.

MADAM: Replying to your letter of April 22, 1936, you are advised the records of this office show that the Lucy Agnes Nos. 1 and 2 oil shale placers were declared null and void by this office on August 18, 1933, because of failure of the owners of the claims to file answer denying the charge that annual assessment work had not been performed on the claims for the year ending July 1, 1929, and that work had not been since resumed.

On June 3, 1935, the Supreme Court of the United States held in the case of Ickes vs. Virginia-Colorado Development Corporation, that the oil shale placer claimant, a party in that case, lost no rights by failure to do annual assessment work on its claims and that such failure gave the Government no right to declare the claims null and void. It further held that proceedings brought by the Government based solely on such a charge went beyond the authority conferred by law and did not affect the validity of the claims. In view of this holding of the Supreme Court, this office considers that it would be unnecessary to revoke its previous decision holding the Lucy Agnes claims to be null and void. That decision being without authority of law is without any effect on the title arising from the location of the claims.

Very respectfully,

(Sgd.) FRED W. JOHNSON,
Commissioner.

APPENDIX C–4

JULY 4, 1944.

Mr. W. PORTER NELSON,
607 California Building, Denver 2, Colorado.

MY DEAR MR. NELSON: I have your letter of June 15 asking for the present status of the contest No. 12478 directed against the Sid Nos. 1 to 22 oil shale placer locations by our letter No. 1069641 of July 16, 1930.

The letter referred to directed new adverse proceedings against the locations mentioned on the charge "That annual assessment work to the value of $100 was not performed upon each or any one of the Sid Nos. 1 to 22 inclusive, oil shale placers for the year ending July 1, 1930, and that work has

not been since resumed." The letter also directed service of notice of the charge on E. B. McNair and George W. Habberset, the record title holders of the locations.

On September 16, 1930, answer was filed in the Denver Land Office by E. B. McNair in which no denial is made of the allegations contained in the charge, but contestee contended that the Sid Nos. 1 to 22 claims having been located prior to the leasing act of February 25, 1920, constituted valid claims existent February 25, 1920, and maintained in compliance with the laws under which they were initiated, etc.

By our letter of June 24, 1931, to the Register it was stated that as the answer merely objected to the charge wihout denying the allegations therein, the contestees were allowed 30 days from notice in which to file a proper answer or appeal to the Secretary of the Interior and that if no action was taken within the time allowed the locations would be declared null and void without further notice. On August 25, 1931, the Register reported no action taken and transmitted evidence of service consisting of registry return receipt signed by E. B. McNair July 24, 1931. Accordingly, by our letter of October 12, 1931, to the Register, the locations were declared null and void as to the interest therein of E. B. McNair and the Register was directed to serve new notice of the decision of July 16, 1930, on George W. Habberset. The records show that such notice was served October 24, 1931, and in his letter of December 1, 1931, the Register reported that no answer was filed by Habberset within the time allowed. Accordingly by our letter of January 7, 1932, to the Register it was held that "The failure of the contestee to file answer denying the charge is taken as an admission by him of the truth thereof, in view of which the Sid Nos. 1 to 22, inclusive, oil shale placer locations are declared null and void in their entirety and the United States has taken possesison of the land within the claims for its own uses and purposes." The case was also closed by that letter.

However, in the case of the Shale Oil Company (55 I.D. 287) the Department held in view of the decision of the Supreme Court in the case of The Virginia-Colorado Development Corporation (295 U.S. 639) that the adverse proceedings in that case, based on charges of failure to do annual assessment work must be held as without authority of law and void.

Very truly yours,

(Sgd.) FRED W. JOHNSON,
Commissioner.

APPENDIX C-5

JULY 17, 1935.

Mr. EDWARD ALTENBERN
De Beque, Colorado.

MY DEAR SIR: Replying to your letter of June 25, 1935, addressed to the Register of the United States land office, Denver, Colorado, and referred here for reply, you are advised that on June 3, 1935, the Supreme Court of the United States held in the case of Ickes, Secretary of the Interior, vs. Virginia-Colorado Development Corporation that the oil shale claimant lost no rights by failure to do the annual assessment work on its claims, that such failure gave the Government no right to declare the claims null and void, and that the proceedings brought by the Government against the claims, based solely on that ground, went beyond the authority conferred by law and did not affect the validity of the claims.

In view of that decision the Department, on June 24, 1935, in the case of the Shale Oil Company, Denver mineral application 042552, recalled and vacated its decision in the Virginia-Colorado Development Corporation case and overruled all its previous decisions in conflict with the decision of the Supreme Court.

You are, therefore, advised that so far as the jurisdiction of this office is concerned, any declaration by it that an oil shale placer claim is null and void based solely on a charge that the claimant failed to perform annual assessment work or resume work on the claim is void and does not affect the right of the owner of the claim to maintain his possession thereof under the mining laws.

However, so far as this office is able to determine from its records, it has never declared null and void any oil shale placers covering the land embraced in your homestead entry, as to such entry which is now pending, should you make satisfactory final proof thereon you will be entitled to a patent if all be found regular, in the absence of any contest or protest by any other parties making claim of a right to the land superior to yours. Your entry is the only claim of record on the tract books of the land office and if any other persons claim the land it is incumbent on them to contest the entry, and should they do so the burden of proof that they have valid claims which have not been abandoned would be upon them.

In the event your homestead entry should be canceled after contest and hearing because of conflict with prior valid mining claims, you would have the right to apply for repayment of all fees and

commissions paid by you in connection with your entry but no reimbursement will be made by the United States for any expenditures on improvements made for any purposes on the entry. So far as this office is concerned, no objection would be made by it to the removal of any such improvements by a homestead entryman after cancellation of his entry, but this should not be taken as authority for the removal of structures which are part of the realty in violation of state laws and of the rights of other parties.

Very respectfully,

(Sgd) FRED W. JOHNSON,
Commissioner.

APPENDIX C–6

OCTOBER 31, 1935.

The Honorable The SECRETARY OF THE NAVY.

MY DEAR MR. SECRETARY: Reference is made to the letter of November 1, 1933, of Secretary Ickes, containing a list of oil shale placer mining claims, with descriptions of the land involved, situated within Naval Oil Shale Reserves Nos. 1 and 3 in Colorado and No. 2 in Utah, involved in adverse proceedings, and the status of each case.

The adverse proceedings involving all of the said claims were based upon a charge that annual assessment work had not been performed upon the claims or claims involved for a stated assessment year and that work had not been resumed thereon. You were informed in the above-mentioned letter that certain claims had been declared null and void in their entirety and others had been declared null and void to the extent of the interests of the parties served with notice, and that further action in all pending cases involving the question of assessment work on oil shale placers was suspended in this office pending a final decision in the courts upon the matter of the authority of this Department to attack the validity of oil shale placer claims upon the ground stated.

On June 3, 1935, the Supreme Court, in the case of *Ickes* vs. *Virginia-Colorado Development Corporation*, held that the United States is without authority to challenge the validity of an oil shale placer claim on account of failure to perform the annual assessment work, or to resume work, thereon. All previous action taken upon such charges in the cases referred to therefore is without effect and void. The status of the claims so far as this Department is concerned is that they are subsisting

claims which, if located on valid discoveries of mineral by qualified locators, segregate the land against its subsequent withdrawal for Naval Oil Shale Reserves unless the claims have been abandoned.

Sincerely yours,

CHARLES WEST,
Acting Secretary of the Interior.

U.S. GOVERNMENT PRINTING OFFICE: 1980